Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

C. D. VERNON, in his official capacity as Sheriff of Rockingham County, North Carolina,

Petitioner,

vs.

WAYNE HARTER and ROBERT PAYNE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Office of Sheriff of Rockingham County, North Carolina is a State office, established by the North Carolina Constitution. The State of North Carolina established the Office of Sheriff in each county in order to preserve the peace across the State, enforce the State laws, provide for Statewide execution of process, provide for order in the State courts, and provide for the carrying out of orders and directions of the State courts. The question presented here is:

Is the Office of Sheriff of Rockingham County, North Carolina an arm of the State of North Carolina and consequently entitled to Eleventh Amendment immunity, even though it is assumed that a third party will indemnify the Office of Sheriff against any adverse judgment and that the State treasury will not be affected by any such judgment?

PARTIES TO THE PROCEEDING

The petitioner in this case is C. D. Vernon in his official capacity as the Sheriff of Rockingham County, North Carolina. (The suit against Vernon in his official capacity is, in effect, a suit against the Office of Sheriff of Rockingham County, North Carolina.) The petitioner was a defendant in the district court and the appellant in the court of appeals.

Wayne Harter and Robert Payne were plaintiffs in the district court, and appellees in the court of appeals.

C. D. Vernon, in his individual capacity, and the County of Rockingham, North Carolina, were defendants in the district court, but were dismissed from this case by the district court. Neither C. D. Vernon in his individual capacity nor the County of Rockingham were parties in the court of appeals. There were no other parties in the court of appeals.

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The petitioner, C. D. Vernon in his official capacity as the Sheriff of Rockingham County, North Carolina, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 22, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit that gives rise to this petition is reported at 101 F.3d 334 (4th Cir. 1996) and is reproduced in the Appendix filed herewith ("App.") at 1a-19a. The unreported opinion of the district court in this case is reproduced at 30a-54a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 22, 1996. (App. A, 1a). A petition for rehearing and suggestion for rehearing *en banc* was denied on January 17, 1997. (App. C, 55a-56a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

STATEMENT OF THE CASE

A. Introduction and Summary

This case involves a suit brought against the Office of Sheriff of Rockingham County, North Carolina by two former employees of the Sheriff. The two former employees of the Sheriff allege that they were discharged due to their "lukewarm support" of the Sheriff's 1994 reelection campaign, and that this violated their "free speech rights" under the United States and North Carolina Constitutions. The Sheriff moved for summary judgment, asserting, among other things, that the Office of Sheriff of Rockingham County, North Carolina (which is synonymous with the Sheriff "in his official capacity"), is an instrumentality of the State of North Carolina, and that therefore the suit was barred by the Eleventh Amendment. The district court recognized that the Office of Sheriff of Rockingham County was not an agent of Rockingham County, and dismissed the County. (App. B, 28a, 39a-41a). The district court also held that the Office of Sheriff of Rockingham County was not an arm of the State, and consequently not entitled to Eleventh Amendment immunity. (App. B, 33a-39a). A panel of the Fourth Circuit affirmed the holding that the Office of Sheriff was not entitled to Eleventh Amendment immunity, in spite of a vigorous dissenting opinion which stated that the panel opinion conflicted with the United States Supreme Court decision of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). (App. A, 1a-27a).

B. Historical Background of the Office of Sheriff

"As a state office, the [Office of] county sheriff dates to [North Carolina's] 1776 Constitution." J. Orth, *The North Carolina State Constitution, with History and Commentary*, p. 141 (1995). The State of North Carolina joined the other twelve original States in declaring independence from Great Britain in 1776. On December 18, 1776, the State of North Carolina adopted a written Constitution. North Carolina's 1776

Constitution established the Office of Sheriff as part of the "government for [the] State:"

> . . . We, the representatives of . . . North Carolina, chosen and assembled in congress for the express purpose of framing a constitution, under the authority of the people, . . . do declare that a government for this State shall be established in manner and form following, to wit:
>
> * * *
>
> Sect. 38. That there shall be a sheriff . . . in each county within this State.

N.C. Const. of 1776, Sect. 38. The duties of the Office of Sheriff were not spelled out in the 1776 Constitution of North Carolina; however, "[w]here the sheriff is named in the [State] Constitution his duties are the same as they were at the time the Constitution was adopted." 1 Anderson, *A Treatise on the Law of Sheriffs* § 43, at 37 (1982). Under the common law, it is the power, and duty, "of sheriffs . . . to preserve the peace, enforce the laws and arrest and commit to jail felons and other infractors of statutory or common law, and execute all process to him directed and attend upon the trial courts of record and to preserve the peace and quiet, to execute and carry out mandates, orders and directions of the courts." 1 *Anderson*, *supra* at § 6, p. 4.[1] Thus, the State of North Carolina, in 1776, elected to preserve the peace across the State, enforce the State laws, provide for the statewide execution of process, provide for order in the State

1. The North Carolina General Assembly has declared that "[a]ll such parts of the common law as were heretofore in force and use within this State . . . and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State." N.C.G.S. § 4-1. The "common law" referred to in N.C.G.S. § 4-1 is the common law of England as of the date of the signing of the Declaration of Independence. *State v. Buckom*, 328 N.C. 313, 316, 401 S.E. 2d 362 (1991); *Hall v. Post*, 323 N.C. 259, 372 S.E. 2d 711 (1988).

courts, and provide for the carrying out of orders and directions of the State courts, by establishing an Office of Sheriff in each county as a State constitutional office and as a part of the "government for [the] State."

The Office of Sheriff in North Carolina has not changed significantly since the adoption of North Carolina's first Constitution in 1776. After the Civil War, on April 24, 1868, the State of North Carolina adopted another Constitution "for the better government of the State," and this Constitution also provided that "[i]n each county a sheriff . . . shall be elected by the qualified voters thereof. . . ." N.C. Const. of 1868, Art. IV, Sect. 24. In 1970, the people of North Carolina adopted a revised Constitution which, like the North Carolina Constitutions before it, mandated that "[i]n each county a Sheriff shall be elected by the qualified voters thereof. . . ." N.C. Const., Art. VII, Sect. 2 (1970). The Office of Sheriff in each county — drawing authority from the State Constitution, the common law, and State statutes — continues to possess the powers and duties it possessed in 1776: the power and duty to preserve the peace, to enforce the State laws, to arrest and commit to jail felons and other infractors of State law, to execute all process, to provide for order in the State courts, and to execute and carry out the orders and directives of the State courts.

Under North Carolina law, the Office of Sheriff of a particular County is not considered to be a County agency, *see, e.g., Peele v. Provident Mutual Life Ins. Co.*, 90 N.C. App. 447, 368 S.E. 2d 892, *disc. rev. den.*, 323 N.C. 366, 373 S.E. 2d 547 (1988); instead, the Office of Sheriff is a constitutional office of the State of North Carolina. *See, e.g., Borders v. Cline*, 212 N.C. 472, 476, 193 S.E. 826 (1937) ("The office of sheriff is constitutional. N.C. Constitution, Art. IV, Sec. 24"). North Carolina courts have determined that a North Carolina Sheriff, in his official capacity, is a State officer and therefore not a "person" subject to suit under 42 U.S.C. § 1983. *See Messick v. Catawba Co., et al.*, 110 N.C. 707, 713-14, 431 S.E. 2d 489, 493, *disc. rev. den.*, 334 N.C. 61, 435 S.E. 2d 336 (1993).

C. Proceedings Below

The respondents Wayne Harter and Robert Payne, former employees of the Office of Sheriff of Rockingham County, North Carolina, brought this lawsuit against the Sheriff of Rockingham County and against Rockingham County, North Carolina. The respondents alleged that they were discharged for their "lukewarm support" of the Sheriff's 1994 reelection campaign, and that this violated their "free speech" rights under the United States and North Carolina Constitutions. Respondents also asserted various other claims.

The defendants moved for summary judgment on or about December 11, 1995. Among other things, defendants argued that the suit against the Sheriff of Rockingham County, in his official capacity, was barred by the Eleventh Amendment.

In the proceedings below, the respondents introduced into evidence a copy of documents pertaining to a "Self-Insurance Pool" which, on their face, purported to indemnify the Sheriff of Rockingham County, North Carolina against costs of litigation, including adverse judgments. For purposes of the Sheriff's summary judgment motion, it was assumed by the parties that any judgment against the Office of Sheriff of Rockingham County would be paid by the "Self-Insurance Pool" or by the Sheriff's statutorily-mandated bond. *See* N.C.G.S. §§ 58-76-5, 162-8. Consequently, for purposes of the Sheriff's summary judgment motion, it was assumed that a judgment against the Office of Sheriff would not impact the treasury of the State of North Carolina.

The district court ruled on defendants' motion for summary judgment in an Order and Judgment, and Memorandum Opinion, filed on March 22, 1996. In ruling on defendants' motion for summary judgment, the court acknowledged that the Sheriff was not a county officer, and granted summary judgment as to the defendant Rockingham County as to all claims asserted by respondents. (App. B, 28a, 39a-41a, 54a). However, the district

court, emphasizing that the State treasury factor was "largely, if not wholly, dispositive," held that the Office of Sheriff of Rockingham County was not an arm of the State, and consequently was not entitled to Eleventh Amendment protection. (App. B, 33a-39a).

The remaining defendant, C. D. Vernon in his official capacity as Sheriff of Rockingham County, timely filed a notice of appeal. The only issue presented on appeal to the United States Court of Appeals for the Fourth Circuit was the issue of whether the Office of the Sheriff of Rockingham County, North Carolina, is an arm of the State of North Carolina and consequently entitled to Eleventh Amendment immunity.

The Fourth Circuit panel, focusing on the impact on the State treasury as "the most decisive factor," held that the Office of Sheriff of Rockingham County was not entitled to Eleventh Amendment immunity. (App. A, 1a-19a). In an unusual move, a member of the Fourth Circuit, prior to the issuance of the panel opinion, requested a poll on whether the case should be reheard *en banc*. A majority of Fourth Circuit judges in active service voted 7-6 against rehearing *en banc*. (App. A, 19a). However, Judge Luttig wrote a dissenting opinion, joined in by four other judges, stating in strong terms that, among other things, the panel opinion in this case *conflicted* with the United States Supreme Court decision in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994).

The Sheriff's petition for rehearing and suggestion for rehearing *en banc* was denied by the Fourth Circuit on January 17, 1997. (App. C, 55a-56a).

The Office of Sheriff of Rockingham County, North Carolina, now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT OPINION IS IN CONFLICT WITH APPLICABLE SUPREME COURT AUTHORITY.

A. As Articulated by the Dissenting Opinion Below, the Panel Opinion Is in Conflict with the Supreme Court's Decision of *Hess v. Port. Auth. Trans-Hudson*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994).

The Fourth Circuit panel opinion is in conflict with the United States Supreme Court decision of *Hess v. Port Auth. Trans-Hudson*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). The fact that the Fourth Circuit panel opinion conflicts with *Hess*, and the particular ways in which the panel opinion conflicts with *Hess*, have been cogently described in Judge Luttig's dissenting opinion in this case, which was joined in by four other Fourth Circuit judges. In relevant part, the dissenting opinion states as follows:

> . . . *Hess* elevated to primacy, together with the concern for the state treasury, the concern for state sovereignty, stating that these two concerns are "the Eleventh Amendment's twin reasons for being." 115 S. Ct. at 404. As we explicitly said in *Gray* [*v. Laws*, 51 F.3d 426 (4th Cir. 1995)],
>
> > These two concerns, "the Eleventh Amendment's twin reasons for being," *id.* at __, 115 S. Ct. at 404, the Court instructed, should dominate the inquiry in cases where it is difficult to discern whether a particular entity is an arm of the state.
>
> *Gray*, 51 F.3d at 432. Today's opinion not only does not accord any particular significance to the state sovereignty factor,

it effectively reads that factor out of the Eleventh Amendment analysis altogether by holding that it is not an independent factor, but merely a proxy for the other factors collectively.

In fact, in what is a most telling misstatement of *Hess*, today's opinion reads as follows:

> The [Supreme] Court found that these factors . . . , pointed in opposite directions for purposes of determining the Eleventh Amendment immunity of the Port Authority. The *Hess* Court reasoned that when this is the case, a court must focus on "the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury. . . . Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations."

Op at 337-338. Significantly, what the Supreme Court actually said was *not* that when the factors point in opposite directions courts should focus on the treasury question; what it said was

> [w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide. *See supra* at 400.

513 U.S. at __, 115 S. Ct. at 404. Of course, as noted, the Supreme Court had identified the "twin reasons for being" as concern for the fisc *and*, "[m]ore pervasively,"concern for state sovereignty. *Id.* at __, 115 S. Ct. at 400. . . . There is nothing whatsoever in *Hess* to support the assertion in today's opinion that *Hess* "held" that "the state treasury factor [is] dispositive." *See* Op. at 339. . . . [The Fourth Circuit, relying upon the Supreme Court's decision in *Hess*,] specifically held in *Gray* that where the state treasury will not be affected by the judgment, whether or not immunity will obtain

> must be determined by resort to the other relevant considerations referenced by the Court, *chief among which are whether the suit will jeopardize "the integrity retained by [the] State in our federal system," and whether the state possesses such control over the entity claiming Eleventh Amendment immunity that it can legitimately be considered an "arm of the state."*

Gray, 51 F.3d at 434 (quoting *Hess*, *id.* at __, 115 S. Ct. at 400) [emphasis added by dissenting Fourth Circuit judges]. . . . Although one can conclude that the treasury concern may be dispositive if payment from the treasury is required . . . , [*Hess* does not imply] that Eleventh Amendment concerns are to be discounted and downgraded when the state treasury is not implicated. Yet this is exactly what today's opinion purports to do.

(App. A, 22a-26a). Thus, as cogently stated by the above-quoted dissenting opinion, the Fourth Circuit opinion is in clear conflict with *Hess* because it fails to accord "any particular significance" to the concern for state sovereignty and dignity, which is one of "the Eleventh Amendment's twin reasons for being." In fact, the Fourth Circuit opinion "effectively reads that factor out of the Eleventh Amendment analysis altogether. . . ."

The Fourth Circuit's failure to accord "any particular significance" to state sovereignty concerns, and to effectively "read [the state sovereignty factor] out of the Eleventh Amendment analysis altogether," is in direct conflict with binding Supreme Court authority. The Supreme Court's decision in *Hess* certainly recognized that the possibility of a judgment depleting the state treasury was one of the concerns underpinning the Eleventh Amendment. However, the Court's opinion also emphasized that one of "the Eleventh Amendment's twin reasons for being" is the concern for "integrity retained by each State in our federal system." *Hess*, 115 S. Ct. at 400, 404. Thus, the Court stated as follows:

> More pervasively, current Eleventh Amendment jurisprudence emphasizes the integrity retained by each state in our federal system:
>
> > "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. *See Hans v. Louisiana*, 134 U.S. 1, 13, 10 S. Ct. 504, 506, 33 L. Ed. 842 (1890). It thus accords the States the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 689, 121 L. Ed. 2d 605 (1993).

Id. at 400. Thus, the Supreme Court in *Hess* made it clear that one of the primary concerns that underpin the Eleventh Amendment is the recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. *Hess, supra* at 400. This is because allowing a suit to go forward in federal court against a State or State office "will jeopardize the integrity retained by the State in our federal system." *Id.* Allowing a State and its offices to retain sovereign immunity in the federal system "accords the States the respect owed them as members of the federation." *Hess, supra*, quoting *Puerto Rico Aqueduct, supra.* Conversely, the language of the *Hess* opinion makes it clear that allowing a suit to go forward against a State or a State office in federal court is not in accord with the Eleventh Amendment, because it is "disrespectful to," and "an affront to the dignity of," the State. *See Hess*, 115 S. Ct. at 401 and 404.

The recent Supreme Court decision in *Seminole Tribe of Florida v. Florida*, __ U.S. __, 116 S. Ct. 1114, __ L. Ed. 2d __ (1996) underscores the importance, in Eleventh Amendment jurisprudence, of the concern for the States' sovereignty and dignity. In the *Seminole Tribe* case, the Supreme Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989), and held that Congress lacked authority under the Indian commerce clause to abrogate the States' Eleventh Amendment immunity. The Supreme Court's lengthy discussion of the rationale for the *Seminole Tribe* decision demonstrates that the fundamental principle underpinning the Eleventh Amendment is the concern for the sovereignty and dignity of the States.

The Supreme Court begins its analysis in *Seminole Tribe* by recognizing that the Eleventh Amendment confirms the presupposition that the States are sovereign entities which may not be sued without their consent. *Id.*, 116 S. Ct. at 1122. The Supreme Court then rejected the argument (which was embraced by the Fourth Circuit panel opinion) that the concern for the State treasury was a more important Eleventh Amendment concern than the concern for the States' sovereignty and dignity:

> . . . The Eleventh Amendment does not exist solely in order to "preven[t] federal court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. __, __, 115 S. Ct. 394, 404, 130 L. Ed. 2d 245 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S. at 146, 113 S. Ct., at 689 (internal quotation marks omitted).

Seminole Tribe, 116 S. Ct. at 1124.

Significantly, the concern for the States' treasuries is only mentioned once (in the above quote) in the Court's well-reasoned *Seminole Tribe* decision, and mentioned only to emphasize that the concern for States' treasuries is not the sole reason for the existence of the Eleventh Amendment. Instead, the Court's lengthy discussion of the Eleventh Amendment focuses on the fact that the Eleventh Amendment "reflects the fundamental principle of sovereign immunity" and that "state sovereign immunity" is "an essential part of the Eleventh Amendment." *Id.*, 116 S. Ct. at 1127-1129. Finally, in overruling the *Union Gas* case, the Supreme Court "reconfirm[ed]" that the "background principle of state sovereign immunity" is strongly "embodied in the Eleventh Amendment. . . . " *Seminole Tribe*, 116 S. Ct. at 1131.

In short, the Supreme Court's decision in *Seminole Tribe* reconfirms the overriding significance, in the Eleventh Amendment equation, of the concern for the sovereignty and dignity of the States and their offices. The *Seminole Tribe* decision represents a shift away from the notion (embraced by the Fourth Circuit) that the concern over State treasuries is the fundamental principle underlying the Eleventh Amendment and toward the traditional idea and "oft-repeated understanding" that concern for State sovereignty and dignity is the fundamental

principle underlying the Eleventh Amendment. *See In Re Ayers*, 123 U.S. 443, 505, 8 S. Ct. 164, 183 (1887) ("The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties").

In sum, the Fourth Circuit panel opinion is in conflict with applicable Supreme Court authority because, as cogently articulated by the dissenting opinion, the panel opinion "does not accord any particular significance" to the concern for State sovereignty and dignity (App. A, 23a), which, as the Court made clear in *Seminole Tribe* and *Hess*, is one of the fundamental principles underlying the Eleventh Amendment. Indeed, as noted by the dissenting opinion, the panel opinion "effectively reads that factor out of the Eleventh Amendment analysis altogether." (App. A, 23a). The Fourth Circuit panel opinion is fatally flawed, and is not in accord with this Court's approach to the Eleventh Amendment.

B. The Fourth Circuit Panel Opinion Is Also in Direct Conflict with the Recent Supreme Court Decision of *Regents of the University of California v. Doe*, __ U.S. __, 117 S. Ct. 900 (1997).

The Fourth Circuit panel opinion is also in clear and direct conflict with the recent United States Supreme Court decision of *Regents of the University of California v. Doe*, __ U.S. __, 117 S. Ct. 900, __ L. Ed. 2d __ (1997).[2] In *Regents*, the Supreme Court addressed, and answered in the negative, the question of "whether the fact that the Federal Government has agreed to indemnify a state instrumentality against costs of litigation, including adverse judgments, divests the state agency of Eleventh Amendment immunity." *Id.*, 117 S. Ct. at 902. In *Regents*, the

2. The Supreme Court had not yet decided *Regents of the University of California v. Doe, supra*, at the time the Fourth Circuit panel issued its opinion in this case. The panel opinion was issued on November 22, 1996; the Supreme Court issued its decision in *Regents* on February 19, 1997.

respondents argued to this Court that the decisive factor in the Eleventh Amendment inquiry was whether the State treasury would be affected by a judgment against the entity in question. The respondents then took the argument one step further, and argued that since a third party had agreed to indemnify the State university against an adverse judgment, the State treasury would not be affected by an adverse judgment, and that, therefore, the State university was not entitled to Eleventh Amendment immunity. This Court rejected the respondents' argument, and held that the question of whether an entity was an arm of the State for Eleventh Amendment purposes does not turn on "a formalistic question of ultimate financial responsibility." *Id.*, 117 S. Ct. at 904. Instead, this Court stated that the federal question of whether a particular entity is an arm of the State "can be answered *only* after considering the provisions of state law that define the agency's character." *Id.*, n. 5 (emphasis added). This Court further explained that the question of whether a money judgment against an entity would be paid by the State was an important question, but was only important "as an indicator of the relationship between the State and the [entity in question]." *Id.* In other words, this Court, in *Regents*, made it clear that the effect on the State treasury was *not* the decisive factor in the Eleventh Amendment analysis; instead, the question of whether a particular entity is an arm of the State "can be answered only after considering the provisions of state law that define the agency's character." *Id.* at n. 5.[3]

The Fourth Circuit panel opinion, in deciding whether the

3. This Court's approach in *Regents* is the logical extension of this Court's reasoning and analysis in *Hess* and *Seminole Tribe*. In *Hess* and *Seminole Tribe*, this Court made it clear that the concern for the State's sovereignty and dignity is a fundamental concern underpinning the Eleventh Amendment. By examining State law to determine whether an entity is an arm of the State, the Court is according the States "the respect owed them as members of the federation." *Hess, supra* at 400. Conversely, it is disrespectful to the States, and an affront to the dignity of the States, *id.* at 401, 404, to analyze the issue of whether an entity is an arm of the State without considering what a State's Constitution, statutes, and courts have to say on the point.

Office of Sheriff of Rockingham County was an arm of the State of North Carolina, utilized a test which is in direct conflict with the approach approved by this Court in *Regents*. Specifically, the panel opinion articulated a test in which the first, most important, and "generally determinative" question was whether the State treasury would have to pay for any judgment that might be awarded. Thus, the Fourth Circuit panel opinion stated as follows:

> . . . The first, and most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded. . . . Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations. . . .
>
> * * *
>
> . . . [W]e here explain more fully the appropriate process for determining whether an entity or official is an arm of the state for Eleventh Amendment purposes. . . . [T]he most important factor is whether the state treasury will pay any resulting judgment. Recognizing this as the dominant inquiry in the courts of appeals, and the correct legal theory, in *Hess* the Supreme Court noted that a finding that the state treasury will pay the judgment is usually dispositive. . . . The state treasury factor is also significant when the state treasury will not pay the judgment. If that is the case, then the most salient factor in Eleventh Amendment decisions weighs against a finding of immunity . . . [T]he impact on the state treasury is generally determinative when the state will not have to pay for a judgment. . . . Thus the district court correctly held that a determination that

> the state treasury will be liable for a particular judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity.

(App. A, 5a-9a) (citations and quotation marks omitted). The Fourth Circuit panel opinion then listed three other secondary factors to consider in determining whether an entity is an arm of the State for Eleventh Amendment purposes: (1) whether the entity exercises a significant degree of autonomy from the State; (2) whether the entity is involved with local versus statewide concerns; and (3) how the entity is treated as a matter of State law. (App. A, 12a-13a). However, the Fourth Circuit panel opinion emphasized that impact on the State treasury was "the most decisive factor" in the Eleventh Amendment analysis. (App. A, 12a).

Clearly, the Fourth Circuit panel opinion is in conflict with the Court's decision in *Regents*, *supra*. In *Regents*, this Court made it clear that the question of whether a particular entity is an arm of the State can only be answered by examining State law, and, moreover, that the question of whether a money judgment against the entity would be paid by the State was significant only insofar as it helped the Court evaluate the relationship between the State and the entity. *Id.* at 904. The Fourth Circuit panel opinion, by contrast, held that the question of whether a money judgment against an entity would be paid by the State was the "first, and most important consideration" in determining whether an entity is an arm of the State (App. A, 5a), and further held that the issue of "how [the entity] is treated as a matter of state law" was a very minor factor for the courts to consider. (App. A, 12a, 16a-18a). Thus, the panel opinion test does exactly what this Court forbad in *Regents*: the panel opinion's test "detach[es] the importance of a State's legal liability for judgments against a state agency from its moorings as an indicator of the relationship between the State and its creation and convert[s] the inquiry into a formalistic question of ultimate financial responsibility." *Regents*, *supra*, 117 S. Ct.

at 904.[4] In short, the Fourth Circuit panel opinion is in direct conflict with this Court's decision in *Regents*.

II. THE FOURTH CIRCUIT PANEL OPINION IS IN CONFLICT WITH DECISIONS OF SEVERAL UNITED STATES COURTS OF APPEAL; INDEED, THERE IS MUCH CONFLICT, AND CONFUSION, AMONG THE FEDERAL COURTS OF APPEAL AS TO THE PROPER TEST TO APPLY WHEN DETERMINING IF A GOVERNMENTAL ENTITY (SUCH AS THE OFFICE OF SHERIFF) IS AN ARM OF STATE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

There is absolutely no uniformity among the circuits on the issue of the proper test to apply when considering whether a governmental entity — such as the Office of Sheriff — is an arm of the State. Eleven circuits have considered the question, and each of these eleven circuits has articulated a test different from the tests employed by the other circuits.[5] Some of the tests

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4. It is worth noting that, in some ways, the facts of this case and the facts of *Regents* are directly analogous. In the instant case, it was assumed below (for purposes of the defendants' summary judgment motion) that any judgment against the Office of Sheriff would be paid by the "Self-Insurance Pool" or by the Sheriff's bond, and that the State treasury would not be affected by the judgment. In *Regents*, of course, it was also assumed that a third party would indemnify the agency in question against any adverse judgment, and that the State treasury would not be affected. It is, therefore, significant that this Court held, in *Regents*, that the fact that an entity might be indemnified against adverse judgments is not relevant to the issue of whether the entity in question is an arm of the State. *Id.* at 904.

5. This Court's recent decision in *Regents*, *supra* should, logically, clear up much of the confusion among the circuits, since this Court, in *Regents*, stated that a determination regarding whether a particular entity was an arm of the State was to be answered based on a consideration of "the provisions of state law that define the agency's character." *Id.* at 904, n. 5. However, the actual holding in *Regents* was very narrow, and this Court's few sentences in *Regents*, regarding the proper test to apply in determining whether an entity is an arm of the State, may be viewed by some courts as nonbinding dicta.

employed by the various circuits are similar, but no two are exactly alike. Many of the circuits list the same or similar factors to consider; however, the circuits are split on even the question of how much weight to give particular factors. For example, the tests employed by the Fourth Circuit panel opinion and by the First and Sixth Circuits accord no particular significance to State sovereignty concerns, and instead emphasize that the *most* important factor to consider is the effect a judgment against the entity would have on the State treasury. In contrast, the Seventh Circuit test emphasizes that the effect on the State treasury is the *least* important factor to consider. In further contrast to these circuits, the Eleventh Circuit test focuses entirely upon the agency's function and character as defined by State law, and does not list, as a factor, the effect of a judgment against the entity on the State treasury.

Rather than attempting to characterize the various tests employed by the circuits, the petitioner lists the various tests below. The tests for the Seventh and Eleventh Circuits are listed first, because these tests are so obviously in conflict with the test employed by the Fourth Circuit panel opinion.

A. United States Court of Appeals for the Seventh Circuit

The Fourth Circuit panel opinion is clearly in conflict with the Seventh Circuit's position.

In *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996), the United States Court of Appeals for the Seventh Circuit reiterated that its test for determining whether an agency was an arm of the State for Eleventh Amendment purposes involved the weighing of three factors: (1) the extent of control the State exercised over the agency; (2) whether the agency acted as the agent of the State; and (3) whether a judgment against the agency would ultimately affect the State treasury. *Id.* at 401, *citing Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129, 114 S. Ct. 2138, 128 L. Ed. 2d 867 (1994). The Seventh Circuit in *Thiel* further held that the effect

on the State treasury was the *least* important of the three factors, and would be irrelevant if the first two weigh in favor of Eleventh Amendment immunity. *Id.* at 401, 403. In so holding in *Thiel*, the Seventh Circuit was unconvinced by the plaintiff's argument that the Supreme Court decision in *Hess, supra*, "stands for the proposition that the 'most important factor in determining whether a state created entity is entitled to Eleventh Amendment immunity is whether a judgment against it would impact the state treasury or . . . whether the entity has an independent source of funding.' " *Thiel, supra* at 401. The Seventh Circuit noted that

> [T]he Court more recently asserted that the "Eleventh Amendment does not exist solely to 'prevent federal judgments that must be paid out of a State's treasury.' " *Seminole*, __ U.S. at __, 116 S. Ct. at 1124. In fact, "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Id.*

Thiel, supra.

The Seventh Circuit's application of its Eleventh Amendment test has led to the holding that sheriffs have dual roles: they act as county officials when performing certain functions, but act as State officials when performing functions for the State — such as executing orders of a State court. *See Reuhman v. Sheahan*, 34 F.3d 525, 529 (11th Cir. 1994) ("The Sheriff is a state agent to the extent state law directs his activities"); *Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992), *cert. denied*, 508 U.S. 942, 113 S. Ct. 2421, 124 L. Ed. 2d 643 (1993). Thus, the Seventh Circuit has held that a Sheriff is entitled to Eleventh Amendment immunity when performing functions for the State, regardless of whether the treasury would be affected by a judgment against the Sheriff. *Reuhman, supra* at 528.

B. United States Court of Appeals for the Eleventh Circuit

The Fourth Circuit panel opinion is in clear conflict with the Eleventh Circuit's position.

The test employed by the United States Court of Appeals for the Eleventh Circuit for determining if an agency is an arm of the State focuses entirely upon the agency's "function and character" as established by State law:

> Whether [an entity] is an arm of the state protected by the Eleventh Amendment "turns on its function and character as determined by state law." *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981). Factors that bear on this determination include the definition of "state" and "political subdivision," the state's degree of control over the entity, and the fiscal autonomy of the entity.

Robinson v. Georgia Dept. of Transportation, 966 F.2d 637, 638-39 (11th Cir. 1992), *cert. denied*, 506 U.S. 1022, 113 S. Ct. 660, 121 L. Ed. 2d 586 (1992). *See also Cross v. State of Alabama, State Dept. of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) ("Whether [entity] is an arm of the state partaking in the state's Eleventh Amendment immunity turns on its function and characteristics as determined by state law").

The Eleventh Circuit's application of its Eleventh Amendment test has caused it to repeatedly hold that Alabama Sheriffs, in their official capacity, are arms of the State entitled to Eleventh Amendment immunity. The Eleventh Circuit's holdings on this point regarding Alabama Sheriffs appear to be based almost entirety upon the wording of the Alabama Constitution, which provides that Alabama's "executive department shall consist of a governor . . . and a sheriff for each

county." Ala. Const. Art. V, § 112. *See, e.g., Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1525 (11th Cir. 1990); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989).

In contrast, the Eleventh Circuit has held that Florida Sheriffs are not entitled to Eleventh Amendment immunity. In so holding, the Eleventh Circuit focused primarily upon Florida state law, particularly the Florida Constitution, which indicates that Florida Sheriffs are county officers. *Hufford v. Rogers*, 912 F.2d 1338, 1341 (11th Cir. 1990), *cert. denied*, 499 U.S. 921, 111 S. Ct. 1312, 113 L. Ed. 2d 246 (1991).

C. United States Court of Appeals for the First Circuit

The test employed by the United States Court of Appeals for the First Circuit for determining if a particular agency is an arm of the State for Eleventh Amendment purposes has been articulated as follows:

> The Eleventh Amendment's primary concern is to minimize federal courts' involvement in disbursal of the state fisc. . . . Generally, if a state has a legal obligation to satisfy judgments against an institution out of the public coffers, the institution is protected from federal adjudication by the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332, 337, 99 S. Ct. 1139, 1143, 59 L. Ed. 2d 358 (1979); *Reyes v. Supervisor of DEA*, 834 F.2d 1093, 1097-98 (1st Cir. 1987).
>
> Because it is not always limpid whether, or to what extent, the state treasury must stand behind the judgment debts of a particular institution, we have identified seven related areas as prospects for further inquiry. These areas, each of which can be mined for information that might clarify the

> institution's structure and function, include: (1) whether the agency has the funding power to enable it to satisfy judgments without direct state participation or guarantees; (2) whether the agency's function is governmental or proprietary; (3) whether the agency is separately incorporated; (4) whether the state exerts control over the agency, and if so, to what extent; (5) whether the agency has the power to sue, be sued, and enter contracts in its own name and right; (6) whether the agency's property is subject to state taxation; and (7) whether the state has immunized itself from responsibility for the agency's acts or omissions. . . . The list is not an all-inclusive compendium, for other areas of inquiry may prove fruitful in particular circumstances. It is, however, clear that all the pertinent factors have a common orientation: the more tightly the agency and the state are entangled, the more probable it becomes that the agency shares the state's Eleventh Amendment immunity.

Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority, 991 F.2d 935, 939-40 (1st Cir. 1993).

D. United States Court of Appeals for the Second Circuit

The United States Court of Appeals for the Second Circuit has explained the test for determining if a particular agency is an arm of the State as follows:

> The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused. In *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628, 630-31 (2d Cir. 1989), *aff'd on other grounds*, 495

U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990), we considered six factors, derived from the Supreme Court's decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979), in deciding whether the Port Authority of New York and New Jersey (the "Port Authority"), a bistate entity created by an interstate compact between those two states, was covered by the Eleventh Amendment: (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

The Supreme Court again addressed the immunity of bistate entities under the arm-of-the-state doctrine in *Hess v. Port Authority Trans-Hudson Corp.*, __ U.S. __, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). . . . The Court . . . discussed the factors that it examined in *Lake Country*, but found that those factors did not "all point the same way." *Id.* at __, 115 S. Ct. at 402. Under these circumstances, the Court indicated that the Eleventh Amendment's twin rationales — protecting the state's fisc and dignity — "remain our prime guide." *Id.* at __, 115 S. Ct. at 404. . . . [F]ollowing the Supreme Court's lead, we first look to the six *Lake Country* factors identified in *Feeney*. Only if those factors point in different directions do we then turn to the next questions: (a) will allowing the

> entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk? We remain mindful of the Supreme Court's emphasis that "the vulnerability of the State's purse [is] the most salient factor." *Hess*, __ U.S. at __, 115 S. Ct. at 404. If all the elements are evenly balanced, this concern will control.

Mancuso v. New York State Thruway Authority, 86 F.3d 289, 293 (2d Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 481, 136 L. Ed. 2d 375 (1996).

E. United States Court of Appeals for the Third Circuit

The "three-pronged inquiry" employed by the United States Court of Appeals for the Third Circuit for determining if a government agency is an arm of the State for Eleventh Amendment purposes has been articulated as follows:

> We have on numerous occasions set forth the criteria to be considered in determining whether an entity is an "alter ego" or "arm" of a state for purposes of the Eleventh Amendment. *See, e.g., Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1350 (3d Cir. 1994); *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 816-18 (3d Cir. 1991) (en banc); *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (en banc). Our oft-reiterated test entails three distinct inquiries: (1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the

> sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency enjoys. *Peters v. Del. River Port Authority*, 16 F.3d 1346, 1350 (3d Cir. 1994) (*citing Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 816 (3d Cir. 1991) (en banc)).

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1144-45 (3d Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 340, 133 L. Ed. 2d 238 (1995). The Third Circuit has "repeatedly held that the most important factor in determining whether an entity is an arm of the State for purposes of the Eleventh Amendment is whether any judgment would be paid from the state treasury." *Independent Enterprises, Inc. v. Pittsburgh Water & Sewer Authority*, 103 F.3d 1165, 1173 (3d Cir. 1997).

F. United States Court of Appeals for the Fourth Circuit

As noted earlier, there is actually a split within the Fourth Circuit regarding the proper test to apply when considering whether an entity is an arm of the State. On one side of the split is the panel opinion in this case (App. A, 1a-19a); on the other side is the dissenting opinion filed in this case, which represents the views of five Fourth Circuit judges. (App. A, 19a-27a). The dissenting opinion states that the case of *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995), contains the appropriate formulation of the test, and further states that the panel opinion in this case "cannot be regarded as controlling authority on questions of Eleventh Amendment immunity" because it conflicts with *Gray v. Laws*. (App. A, 21a).

Perhaps because of the split within the Fourth Circuit, the circuit has been inconsistent in its decisions regarding whether State sheriffs are entitled to Eleventh Amendment immunity. In contrast to the panel opinion in this case, the Fourth Circuit panel in *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996) found that the Office of Sheriff of Greenville County, South Carolina was entitled to Eleventh Amendment immunity even though there was no evidence that the South Carolina treasury would be affected by a judgment against the Sheriff. *Id.* at 1332. In spite of the *Harter* panel opinion's attempt to distinguish the *Harter* and *Cromer* decisions, there really are no substantive differences between the Office of Sheriff of Rockingham County, North Carolina and the Office of Sheriff of Greenville County, South Carolina.

G. United States Court of Appeals for the Fifth Circuit

The test employed by the United States Court of Appeals for the Fifth Circuit for determining if an agency is an arm of the State for Eleventh Amendment purposes has been articulated as follows:

> Whether a particular governmental body is a state or local entity is a question usually addressed in the context of determining Eleventh Amendment immunity. *See, e.g., Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 131 (5th Cir. 1986); *Clark v. Tarrant County*, 798 F.2d 736, 744 (5th Cir. 1986). To draw this distinction, "we must examine the particular entity in question and its powers and characteristics as created by state law. . . ." *Minton*, 803 F.2d at 131 (internal quotations and citations omitted). We consider the following relevant factors:
>
> (1) whether state law views the entity as an arm of the state; (2) the source

> of the entity's funding; (3) the degree of local autonomy retained; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity retains the right to hold and use property.
>
> *Stem v. Ahearn*, 908 F.2d 1, 4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991); *see Clark*, 798 F.2d at 744-45.

Flores v. Cameron County, TX, 92 F.3d 258, 264-65 (5th Cir. 1996). *See also PYCA Industries, Inc. v. Harrison County Waste Water Mgt. Dist.*, 81 F.3d 1412, 1416 (5th Cir. 1996).

H. United States Court of Appeals for the Sixth Circuit

The Sixth Circuit's test for determining if a particular agency is an arm of the State entails a consideration of the status of the agency under State law. *Hutsell v. Sayre*, 5 F.3d 996, 999 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119, 114 S. Ct. 1071, 127 L. Ed. 2d 389 (1994), *citing Estate of Ritter v. University of Mich.*, 851 F.2d 846, 848 (6th Cir. 1988). The Sixth Circuit has also recognized that "the most important factor in resolving this question . . . is whether any monetary judgment would be paid out of the state treasury." *Hutsell, supra.*

I. United States Court of Appeals for the Eighth Circuit

The United States Court of Appeals for the Eighth Circuit has explained the test for determining if a government agency is an arm of the State for Eleventh Amendment purposes as follows:

> We [have] established a framework for

determining whether the eleventh amendment applies to a subdivision of the state:

> Courts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury.

Sherman v. Curators of the University of Missouri, 16 F.3d 860, 863 (8th Cir. 1994), *citing Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir. 1985). *See Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1439 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1080, __ L. Ed. 2d __ (1997).

J. United States Court of Appeals for the Ninth Circuit

In *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771 (9th Cir. 1995), *rev'd sub nom, Regents of Univ. of Calif. v. Doe*, __ U.S. __, 117 S. Ct. 900, __ L. Ed. 2d __ (1997), the United States Court of Appeals for the Ninth Circuit reiterated that its "five-factor analysis," used to determine if a particular agency was an arm of the State, was as follows:

> (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has power to take property in its own name or only the name of the state, and (5) the corporate status of the entity.

Id. at 774, *citing ITSI TV Prods. v. Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993). *See also Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996).

K. United States Court of Appeals for the Tenth Circuit

The test employed by the United States Court of Appeals for the Tenth Circuit for determining if an agency is an arm of the State for Eleventh Amendment purposes has been articulated as follows:

> Whether a governmental entity is entitled to Eleventh Amendment immunity turns on the characterization of the entity under state law, the guidance and control exercised by the state, the degree of state funding, and the entity's ability to provide for its own financing by levying taxes and issuing bonds. *See, e.g., Haldeman v. Wyoming Farm Loan Bd.*, 32 F.3d 469, 473 (10th Cir. 1994); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 994-97 (10th Cir. 1993). *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-80, 97 S. Ct. 568, 572-73, 50 L. Ed. 2d 471 (1977). The most important factor in determining whether a governmental entity is entitled to Eleventh Amendment immunity is whether a judgment against it would be paid from the state treasury. *Hess v. Port Authority Trans-Hudson Corp.*, __ U.S. __, __, 115 S. Ct. 394, 404, 130 L. Ed. 2d 245 (1994).

Sonnenfeld v. Denver, 100 F.3d 744, 749 (10th Cir. 1996).

In sum, there is absolutely no uniformity among the circuits on the proper test to apply when considering whether a governmental entity is an arm of the State. The Office of Sheriff of Rockingham County strongly supports the position of the Eleventh Circuit, which is consistent with this Court's analysis and reasoning in *Hess*, *Seminole Tribe*, and *Regents*. The question of whether a particular entity is an arm of the State

should be answered based on State law, in order to accord the States the respect owed to them as members of the federation. The approach of the Fourth Circuit panel opinion, and of the First and Sixth Circuits, amounts to nothing more than answering "a formalistic question of ultimate financial responsibility," *Regents, supra* at 904, and ignoring sovereignty concerns. At any rate, regardless of which, if any, of the circuits is employing the correct test, the test should not vary from circuit to circuit, as is currently the case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED NOVEMBER 22, 1996

Wayne HARTER; Robert Payne,
Plaintiffs-Appellees,

v.

C.D. VERNON, individually and in his official capacity as Sheriff of Rockingham County; Rockingham County,
Defendants-Appellants,

Guilford County, Movant.

No. 96-1434.

United States Court of Appeals,
Fourth Circuit.

Argued Sept. 25, 1996.

Decided Nov. 22, 1996.

* * *

Before RUSSELL, NIEMEYER and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge MOTZ wrote the opinion, in which Judge NIEMEYER joined. Judge RUSSELL concurred only in the judgment.

Appendix A

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

The district court concluded that a sheriff in North Carolina is not a state official for purposes of Eleventh Amendment immunity. Because the state treasury would not pay any judgment against a sheriff and because the state would suffer no indignity to its sovereign integrity if immunity were not accorded to a sheriff, we affirm.

I.

The sheriff of Rockingham County, North Carolina, C.D. Vernon, hired Wayne Harter as a dispatcher in 1988; Vernon hired Robert Payne as a deputy sheriff in 1989. Five years later, in 1994, Vernon faced competition from a former deputy, Sam Page, for the Democratic nomination for sheriff. According to Harter and Payne, Vernon directly pressured his employees to campaign actively on his behalf, and to donate funds to his re-election. Sheriff's department employees were solicited for campaign contributions during shift meetings, and were told to post signs supporting Sheriff Vernon in their yards. Vernon assertedly threatened to discharge deputies after the primary if they failed to support him. Payne and Harter minimally supported Vernon's campaign. Payne donated ten dollars to the campaign, and did not vote. Harter told Sheriff Vernon that he supported him, but preferred not to campaign for him. Nonetheless, Vernon defeated his challenger in the primary election.

At approximately the time of the primary election, Sheriff Vernon began to investigate alleged wrongdoings by certain

deputies. Vernon's investigation revealed that five members of Payne's work shift repeatedly failed to check-out with the dispatcher before taking their breaks. Vernon spoke to three of these deputies about their behavior, and fired the other two — Payne and Richard Lintecum — without speaking to them. Payne and Lintecum were the only two of the five who did not support Vernon's campaign. The same investigation also assertedly unearthed difficulties with Harter's work, and Vernon discharged him as well. In all, Vernon fired Harter and Payne, and seven other employees. Harter and Payne allege that all of these employees failed to support Vernon's campaign. Harter and Payne also assert that they were never told that their job performance was "in any way inadequate."

On January 31, 1995, Harter and Payne filed suit against Rockingham County and Sheriff Vernon, in his individual and official capacities. Harter and Payne alleged violations of the United States and North Carolina Constitutions. The County and Vernon moved for summary judgment on all counts.

The district court granted summary judgment to the County on all claims, explaining that in its view, Vernon "was not acting pursuant to a policy of the county," and "under state law the sheriff is not an agent of the county in employment decisions." In addition, the court granted Vernon summary judgment on the constitutional claims asserted against him in his personal capacity. The court, however, held that the Eleventh Amendment did not bar claims against Vernon in his official capacity. The court reasoned that since it was uncontroverted that a judgment against the sheriff would not affect the state treasury, this factor "largely, if not wholly" disposed of any claim to immunity, and that other relevant factors also indicated that a North Carolina sheriff is not a state officer.

Vernon appealed; Harter and Payne did not cross appeal. Accordingly, the Eleventh Amendment ruling is the only issue presented for our review. We do not address, and express no opinion as to the correctness of, any of the district court's other holdings.

II.

Denial of summary judgment on the basis of Eleventh Amendment immunity is immediately appealable. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-47, 113 S. Ct. 684, 687-89, 121 L. Ed. 2d 605 (1993). We review questions of the applicability of Eleventh Amendment immunity *de novo. Ristow v. South Carolina Ports Auth.*, 27 F.3d 84, 86 (1994), *vacated on other grounds*, __ U.S. __, 115 S. Ct. 567, 130 L. Ed. 2d 485 (1994).

The Eleventh Amendment provides: "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. although by its terms the Amendment applies only to suits brought against a state by "Citizens of another state," it is well established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Puerto Rico Aqueduct,* 506 U.S. at 144, 113 S. Ct. at 687. This immunity applies to state agencies that may be properly characterized as "arm[s] of the State," *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 280, 97 S. Ct. 568, 572-73, 50 L. Ed. 2d 471 (1977), as well as to state employees acting in their official capacity. *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989).

The Eleventh Amendment, however, affords no protection to local government entities and employees. *Id.* at 70, 109 S. Ct. at 2311-12. The crucial question, therefore, in many Eleventh Amendment cases is whether an agency or official is properly characterized as an arm of the state, or of the local government.

Vernon makes two principal arguments as to why the district court erred in holding that a North Carolina sheriff is not a state official for Eleventh Amendment purposes. First, he claims that the court followed the wrong test in determining whether a sheriff is an arm of the state because the court did not properly weigh the state's "sovereign integrity and dignity." Alternatively, Vernon asserts that even if the district court articulated the proper test, it applied that test incorrectly. We consider each argument in turn.

III.

The test employed in the Fourth Circuit for determining whether an agency or employee constitutes an arm of the state was first stated in *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm.*, 822 F.2d 456 (4th Cir. 1987). That case set forth a four-part, nonexclusive test for determining whether an entity is an alter ego of the state. The first, and "most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded." *Ram Ditta,* 822 F.2d at 457. The other three inquiries include, but are "not necessarily limited to, [1] whether the entity exercises a significant degree of autonomy from the state, [2] whether it is involved with local versus statewide concerns, and [3] how it is treated as a matter of state law." *Id.* at 457-58. (internal citations omitted). *Ram Ditta* made clear that "[a]lthough a federal court may consider how an entity is treated

under state law, 'the question of whether an agency is an *alter ego* of the state . . . is a question of federal, not state, law.' " *Id.* at 458 n. 5 (quoting *Blake v. Kline,* 612 F.2d 718, 722 (3rd Cir. 1979), *cert. denied,* 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980)).

This court continued to apply the *Ram Ditta* test until the Supreme Court's most recent Eleventh Amendment "arm of the state" case, *Hess v. Port Auth. Trans-Hudson,* 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). *Hess* announced that Eleventh Amendment inquiries should be guided by the Eleventh Amendment's twin reasons for being: preventing judgments from depleting state treasuries, and maintaining "the integrity retained by each State in our federal system." *Hess,* 513 U.S. 30, __, 115 S. Ct. at 400, 404.

In *Hess,* the court proceeded in two steps to find that the New York/New Jersey Port Authority was not to be regarded as a state entity entitled to Eleventh Amendment immunity. First, the Court considered "indicators"of state entities: whether local or state governance controlled the entity, whether the implementing legislation characterized the entity as a state agency and how state courts have ruled on the issue, whether the entity's functions have traditionally been regarded as state or local, and whether a state has financial responsibility for the entity. *Id.* at __ - __, 115 S. Ct. at 402-03.

The Court found that these factors, which echo the factors articulated in *Ram Ditta,* pointed in opposite directions for purposes of determining the Eleventh Amendment immunity of the Port Authority. The *Hess* Court reasoned that when this is the case, a court must focus on "the impetus for the Eleventh Amendment: the prevention of federal court judgments that must

be paid out of a State's treasury. . . . Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Hess*, 513 U.S. at __, 115 S. Ct. at 404. Thus, *Hess* established that in making a determination as to entitlement to Eleventh Amendment immunity a number of factors must be considered, but that *Ram Ditta* was correct that the state treasury factor is the most important.

We recognized this in *Gray v. Laws*, 51 F.3d 426, 434 (4th Cir. 1995), holding that *Hess* had not "materially altered the Eleventh Amendment analysis we formulated in *Ram Ditta*," and that "the changes in our circuit's Eleventh Amendment analysis wrought by *Hess* [were] not significant . . . [but] neither [were] they inconsequential." Rather than articulating the particulars of the Eleventh Amendment inquiry in *Gray*, we remanded the case to the district court because it was "in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the eleventh amendment issue." *Gray*, 51 F.3d at 434 (internal quotations omitted).

Although remand was entirely appropriate in *Gray*, leaving the particulars of the Eleventh Amendment analysis somewhat undefined has resulted in confusion among the district courts including the split in the district courts in North Carolina as to the Eleventh Amendment immunity of North Carolina sheriffs. Three judges in the Eastern District of North Carolina have held that the Eleventh Amendment bars official capacity claims against a North Carolina sheriff, while judges in the Middle District and Western District have held that it does not *Compare Braswell v. Ellis*, No. 5:94-CV-325-D3 (E.D.N.C. July 19, 1995) (Order Den. Mot. for Recons.) (holding a North Carolina sheriff

to be a state actor and immune from official capacity suits under the Eleventh Amendment), *and Merritt v. Beckham,* No. 5:94-CV-462-BO(3) (E.D.N.C. Mar 8, 1995) (Order) (same), *and Edwards v. Sheriff Billy Smith,* 5:94-CT-24-BR (E.D.N.C. Sept. 22, 1994) (Order) (same), *with Harter v. Vernon,* NO. 3:95CV75 (M.D.N.C. March 22, 1996) (Memorandum Opinion) (holding that Sheriff is not a state official for Eleventh Amendment immunity purposes), *and Carter v. Good,* 4:94CV200 (W.D.N.C. June 7, 1996) (Memorandum Opinion) (same).[1]

In light of this confusion we here explain more fully the appropriate process for determining whether an entity or official is an arm of the state for Eleventh Amendment purposes. As we have recognized in virtually all of our Eleventh Amendment jurisprudence, the most important factor is whether the state treasury will pay any resulting judgment. *Cromer v. Brown,* 88

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1. Some of these cases also evidence confusion on one additional point — whether a defendant state official can claim immunity from suit in federal court because he is not "a person" under § 1983. "Personhood" *vel non* does not provide a basis for a state official to avoid suit in federal court. Rather, a defendant state official must plead Eleventh Amendment immunity. The Eleventh Amendment is a bar to the jurisdiction of a federal court, and as such, it precedes the statutory question of "personhood" under § 1983. Once the Eleventh Amendment inquiry is complete, there is no need to consider "personhood." If an official or entity is not immune from suit under the Eleventh Amendment that official or entity *is* a "person" subject to suit under § 1983. *See Will,* 491 U.S. at 70-71, 109 S. Ct. at 2311-12 (holding that states, and state officials and entities, are not "persons" under § 1983 and stating "our holding here . . . applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes"). The opposite is also true, if the Eleventh Amendment applies, the entity or official is not a person under § 1983. *Id.* Therefore, federal courts should approach these issues solely under the rubric, of the Eleventh Amendment, and should not consider an argument of "personhood" under § 1983.

F.3d 1315, 1332 (4th Cir. 1996); *Gray*, 51 F.3d at 433; *Bockes v. Fields*, 999 F.2d 788, 790-91 (4th Cir. 1993), *cert. denied*, 510 U.S. 1092, 114 S. Ct. 922, 127 L. Ed. 2d 216 (1994); *Ram Ditta*, 822 F.2d at 457. Recognizing this as the dominant inquiry in the courts of appeals, and "the correct legal theory," in *Hess* the Supreme Court noted that a finding that the state treasury will pay the judgment is usually "dispositive." *Hess*, 513 U.S. at __ - __, 115 S. Ct. at 404-06.

In light of the importance of the state treasury factor, we held in *Bockes*, and reiterated in *Gray*, that if the state treasury will pay the judgment, the entity is immune from suit, and the other *Ram Ditta* factors need not be considered. *Gray*, 51 F.3d at 433-34 (citing *Bockes*, 999 F.2d at 790-91).

The state treasury factor is also significant when the state treasury will not pay the judgment. If that is the case, then "the most salient factor in Eleventh Amendment decisions" weighs against a finding of immunity. *Hess*, 513 U.S. at __, 115 S. Ct. at 404. Although in that situation, a court should consider the other *Ram Ditta* factors, *Hess* makes clear that the impact on the state treasury is generally determinative when the state will not have to pay for a judgment: "If the expenditures of the enterprise exceed the receipts, is the state in fact obligated to bear and pay the difference? When the answer is 'No' — both legally and practically, then the Eleventh Amendment's core concern is not implicated." *Id.* at __, 115 S. Ct. at 406. Thus the district court correctly held that "a determination that the state treasury will be liable for a particular judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity."

Nevertheless, Vernon argues that the state treasury factor is only determinative if the state will pay; he claims that if the

state is not responsible for the judgment, the sovereign dignity of the state becomes the determinative factor. Vernon relies on the Supreme Court's recent discussion of state sovereignty in *Seminole Tribe of Florida v. Florida*, __ U.S. __, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), and *Hess* itself; neither case provides support for Vernon's theory.

Seminole Tribe held Congress has no power under Article III of the Constitution to abrogate the Eleventh Amendment immunity of a state; the case had nothing to do with *who* the Eleventh Amendment applies to. Rejecting the petitioner's argument that Congress has power to abolish a state's Eleventh Amendment immunity when an "Act authorizes only prospective injunctive relief rather than retroactive monetary relief," the Court held that the choice of remedy — damages or prospective relief — has no effect on Congressional power. *Seminole Tribe*, __ U.S. at __, 116 S. Ct. at 1124. In the course of this discussion the Court stated that "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury,' *Hess v. Port Authority, Trans-Hudson Corporation*, 513 U.S. 30, __, 115 S. Ct. 394, 404, 130 L. Ed. 2d 245 (1994); it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals. . . ." *Seminole Tribe*, __ U.S. at __, 116 S. Ct. at 1124 (parallel citations omitted). This is certainly true, but contrary to Vernon's suggestion, this one sentence quotation of *Hess* for a black letter rule of Eleventh Amendment law does not address what entities are subject to the Eleventh Amendment, and does not overrule, or even undercut, the Court's explicit holding in *Hess* two years earlier.

Moreover, Vernon's reliance on *Hess* for the proposition that the state treasury factor is only crucial if the state will pay

the judgment (and not if the state will not pay it) is misplaced. *Hess* itself renders that argument untenable. The *Hess* Court made no distinction between cases where the state treasury would be affected and those in which it would not be affected, in holding the state treasury factor "dispositive." *Hess*, 513 U.S. at __, 115 S. Ct. at 405. Instead, the Court cited with approval a number of cases holding that if a state would not be liable for the judgment, the Eleventh Amendment does not apply. *Id.* at __ - __, 115 S. Ct. at 404-05 (citing and quoting *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 942-43 (1st Cir. 1993) ("First, and most fundamentally [the entity's] inability to tap the Commonwealth treasury or pledge the commonwealth's credit leaves it unable to exercise the power of the purse. On this basis, [the entity] is ill deserving of Eleventh Amendment protection")); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 948 F.2d 1084, 1087 (8th Cir. 1991) ("Because Missouri and Illinois are not liable for judgments against Bi-State, there is no policy reason for extending the states' sovereign immunity to Bi-State."). Perhaps most significantly, *Hess* itself concerned a suit where state treasuries were not responsible for the judgment, and treated the state treasury factor as critical in denying Eleventh Amendment immunity. *Id.* at __, 115 S. Ct. at 406. The court could not have done this if, as Vernon maintains, the state treasury factor is only critical when the state is responsible for a judgment.

Vernon's theory is also contrary to our case law and to logic. Vernon asserts that when the state treasury will *not* be responsible for a judgment, the sole consideration becomes whether the state's "integrity" will be injured by any judgment and he treats the "integrity" factor as if it requires an inquiry separate from examination of *Ram Ditta* factors. Our decision in *Gray* established that *Hess* did not "materially alter[ ] the

Eleventh Amendment analysis we formulated in *Ram Ditta.*" *Gray,* 51 F.3d at 434. We recognize that "the sovereign dignity of the states' is a principal concern of the Eleventh Amendment, *Gray,* 51 F.3d at 432; but the possible harm to a state's sovereign dignity is not a separate, free-floating factor outside of the *Ram Ditta* considerations. Instead, we utilize the *Ram Ditta* factors to measure whether the sovereign dignity of a state would be affected by a suit against an entity or official.

In sum, when determining if an officer or entity enjoys Eleventh Amendment immunity a court must first establish whether the state treasury will be affected by the law suit. If the answer is yes, the officer or entity is immune under the Eleventh Amendment. *Bockes,* 999 F.2d at 790-91. If the answer is no, the most decisive factor weighs against Eleventh Amendment immunity, but the court should also consider the other three *Ram Ditta* factors.

Because Vernon also challenges the district court's application of the other *Ram Ditta* factors, we now turn to that issue.

IV.

The four *Ram Ditta* factors are "whether the state treasury will be responsible for paying any judgment that might be awarded. . . . [W]hether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus state-wide concerns, and how it is treated as a matter of State law." *Ram Ditta,* 822 F.2d at 457-58. The inquiry begins with the first factor, because "the most important consideration is whether the state treasury will be affected." *Id.* at 457. It is undisputed that North Carolina does not have to satisfy

judgments against sheriffs. Because the "state treasury will not be affected" by any such judgment, we examine the remaining *Ram Ditta* factors, keeping in mind that the most important consideration weighs against immunity.

A.

As to the degree of a sheriff's autonomy from or control by the state, Vernon is correct that North Carolina exercises considerable authority over the office of sheriff. The State Constitution creates the office. N.C. Const. art. VII, § 2. North Carolina statutes set the sheriff's term of office, N.C. Gen. Stat. § 162-1 (1995) (sheriff to serve a four year term), and the qualifications for office. § 162-2. North Carolina statutes also require the sheriff to perform multiple duties, for example, the duty to receive and execute process, § 162-13 to -14, the duty to keep the county jail, § 162-22 to -23, and the duty to issue concealed weapons permits. § 14-415.10 to 14-415.23.

Vernon ignores, however, a series of indicia suggesting substantial county control of sheriffs. Residents of a county elect their sheriff. N.C. Const. art. VII, § 2; N.C. Gen. Stat. § 162-1. The Board of County Commissioners determines the number of salaried employees in the sheriff's office. § 153A-103. The county sets and pays the salaries of a sheriff and his deputies and the county determines and pays the overall budget. §§ 153A-103, 153A-149. If a vacancy arises in the position of sheriff, either by resignation or removal, the Board of County Commissioners appoints a new sheriff for the remainder of the sheriff's term. § 162-5. A petition for removal of a sheriff is prosecuted by the county attorney, § 128-17, before a judge of the Superior Court in the county where the sheriff resides. § 128-16. If a sheriff resigns, he forwards his resignation to the

county commissioners. § 162-3. Sheriffs must also furnish a bond to the county commissioners, with the amount of the bond set by the commissioners. § 162-8.[2]

Therefore, county government controls many significant aspects of North Carolina sheriffs' employment. County residents hire the sheriff (through election), the county government sets their pay, the county provides for the number of deputies, and the county attorney is the official with the power to move to dismiss the sheriff. In contrast, no state agency or official oversees the activities of sheriffs.

A sheriff also has significant autonomy from both the state and the county in the performance of his duties. For example, the sheriff has freedom "to hire, discharge and supervise the employees in his office." N.C. Gen. Stat. § 153A-103(1).[3]

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2. These statutes supply some of the reasons why Vernon's reliance on *Cromer*, 88 F.3d 1315, is misplaced. In *Cromer* we held that South Carolina sheriffs were state officials for Eleventh Amendment purposes. However, in South Carolina, unlike North Carolina, the state legislature provides for the sheriff's compensation. S.C. Const. art. V, § 24. *See* S.C. Code Ann. §§ 23-11-10 et seq. (Law Co-op 1994). Moreover, the South Carolina governor, unlike the North Carolina governor, is the public official empowered to remove a sheriff from office for misconduct and to fill a vacancy in the sheriff's office. S.C. Code Ann. §§ 1-3-240 and 23-11-40 (Law Co-op 1994). South Carolina also mandates training for its sheriffs within the first year of their elected terms. § 23-11-110(C). North Carolina does not require training for "the Sheriff elected by the people." N.C. Stat. § 17E-11(a) (1995). Finally, and most significantly, while in *Cromer* we could not discern whether the South Carolina treasury would pay for some, or all, of a resulting judgment, in this case it is undisputed that the North Carolina treasury will not pay any judgment.

3. In finding that Vernon was not a state official the district court focused (Cont'd)

The question of the autonomy of a sheriff is mixed. Although a sheriff's duties are set forth in a number of North Carolina statutes, the individual county in which a sheriff serves exercises significant control over him, and the sheriff also enjoys considerable autonomy from both state and county control. This factor does not weigh strongly in either direction.

B.

We next consider "whether [the entity] is involved with local versus statewide concerns." *Ram Ditta,* 822 F.2d at 458. In *Hess* the Supreme Court inquired whether an entity's functions are "classified as typically state or unquestionably local." *Hess,* 513 U.S. at __, 115 S. Ct. at 403.

It has long been understood that a sheriff is a "law enforcement officer of the county." *Southern Ry. Co. v. Mecklenburg County,* 231 N.C. 148, 56 S.E. 2d 438, 440 (1949).

(Cont'd)
on the sheriff's autonomy in employment decisions, because "[t]he inquiry must focus narrowly on the actions alleged since the sheriff may be a state officer for some purposes, but not others." We note that in *Gray* we warned against using this type of "functional" approach:

> While it is true that whether a judgment against an official is payable from the state treasury on occasion may depend upon the function being performed by the official at the time of the alleged illegal conduct, the primary consideration for Eleventh Amendment immunity is whether the state is liable for the judgment against the employee, not the function performed by the employee.

Gray, 51 F.3d at 435.

See also Webster's Third New Int'l Dictionary 2094 (3d ed. 1993) (defining sheriff as "an important county officer in the U.S."); Black's Law Dictionary 1376 (6th ed. 1990) (defining sheriff as "[t]he chief executive and administrative officer of a county."). Sheriffs have been considered county officers from the creation of that office in England. "The title sheriff is said to be derived from the Saxon word 'seyre,' a shire or county, and 'reeve,' bailiff or keeper; the 'seyre-reeve' or bailiff of a county." 39 Words and Phrases 246 (quoting *Commonwealth v. Cluley*, 56 Pa. 270, 275 (1867).

It is true that sheriffs are involved in state concerns, notable enforcing state laws, and performing multiple duties for the benefit of the state. But, generally a sheriff may only enforce these laws, or perform these duties, within a given county. Furthermore, a sheriff is ultimately elected by a county, and responsible to the county.

The office of the sheriff has generally been involved with local rather than state concerns; its functions are typically local. Thus, this factor weighs against Eleventh Amendment immunity.

C.

The last factor involves "how [the entity] is treated as a matter of state law." *Ram Ditta*, 822 F.2d at 458.

This factor has engendered great confusion. Some cases have mistakenly treated a state court decision as to whether an entity is a state actor as determinative. *See, e.g. Levinson-Roth v. Parries*, 872 F. Supp. 1439, 1447 (D. Md. 1995) (according Eleventh Amendment immunity to Maryland sheriffs because "[t]he Court determines the status of Sheriff Kight and Deputy

Popkin by referring to Maryland law."); *Gulledge v. Smart*, 1989 WL 69302 **2 (4th Cir., June 19, 1989) (relying solely on a South Carolina state court case to find sheriff immune under the Eleventh Amendment). In fact, "the question of whether an agency is . . . immune from federal jurisdiction under the Eleventh Amendment is a question of federal, not state, law." *Ram Ditta*, 822 F.2d at 458 n. 5.

As a matter of federal law, a court may consider both the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question. *See Hess*, 513 U.S. at __, 115 S. Ct. at 403 (examining both the relevant state statutes, and the decisions of state courts); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 280-81, 97 S. Ct. 568, 572-73, 50 L. Ed. 2d 471 (1977) (examining state statutes); *Gray*, 51 F.3d at 435-37 (examining state statutes and a state court ruling). A federal court may "give deference to the rationale used by a state court," but the holding is not dispositive as a matter of federal law. *Ram Ditta*, 822 F.2d at 460. *See also Gray*, 51 F.3d at 437 (cautioning district court against over reliance on a state court decision if "there is no reasoning provided for the [state] court's conclusion").

Vernon argues that because North Carolina courts have twice held that a sheriff is a state official we are bound by those decisions. *See Messick v. Catawba County*, 110 N.C. App. 707, 713-14, 431 S.E. 2d 489, 493 (N.C. Ct. App. 1993), *disc. review denied*, 334 N.C. 621, 435 S.E. 2d 336 (N.C. 1993) (dismissing § 1983 official capacity claim against a sheriff); *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E. 2d 744 (N.C. Ct. App. 1993) (same). As we did in *Gray*, we find the proffered state court holdings here unpersuasive in view of the fact that neither was decided by the state's highest court, and "there is no reasoning provided

for [either] court[s'] conclusion." *Gray*, 51 F.3d at 437. We find more instructive another North Carolina case, *Hull v. Oldham*, 104 N.C. App. 29, 41, 407 S.E. 2d 611, 618 (N.C. Ct. App. 1991), *disc. review denied*, 330 N.C. 441, 412 S.E. 2d 72 (N.C. 1991), which discussed the relevant sections of the North Carolina Constitution and held that a sheriff is a local official.

Nonetheless, Vernon argues that if we do not follow *Messick* and *Slade*, we will violate the dignity of North Carolina. This is simply incorrect. When this court has ruled on an issue of North Caroline law in a diversity case, we lose no dignity if a North Carolina court disagrees and corrects us. Our holdings on questions of state law do not bind state courts, nor do state court determinations on questions of federal law control us.

The relevant state constitutional and statutory provisions indicate that sheriffs in North Carolina are not state officials. The North Carolina legislature itself has provided that "[t]he sheriff is the only officer of *local* government required by the Constitution." N.C. Stat. § 17E-1 (1995) (emphasis added). The office of sheriff is created under Article VII of the North Carolina Constitution, entitled "Local Government." N.C. Const. art. VII, § 2. *See Hull v. Oldham*, 104 N.C. App. at 41, 407 S.E. 2d at 618. As discussed within, North Carolina statutes provide the county with control over many relevant aspects of the sheriff's employment and also permit sheriffs considerable autonomy.

Thus, examination of the relevant constitutional and legislative provisions and the better reasoned case law lead us to conclude state law treats sheriffs as local officials. The state law factor also weighs against Eleventh Amendment immunity.

Appendix A

V.

In sum, the Eleventh Amendment does not bar a suit against a North Carolina sheriff in his official capacity. The North Carolina treasury will be unaffected by any judgment against a sheriff, and the other three *Ram Ditta* factors are either equivocal, or militate toward denial of immunity. The order of the district court denying Eleventh Amendment immunity to Sheriff Vernon is hereby

AFFIRMED.

ORDER

A member of the Court requested a poll on whether this case should be reheard *en banc*. A majority of judges in active service voted that it should not be reheard *en banc*.

Chief Judge WILKINSON and Judges RUSSELL, WIDENER, WILKINS, LUTTIG, and WILLIAMS voted for rehearing *en banc*. Judges HALL, MURNAGHAN, ERVIN, NIEMEYER, HAMILTON, MICHAEL, and MOTZ voted against rehearing *en banc*.

Judge LUTTIG filed an opinion dissenting from the denial of rehearing *en banc*, in which Chief Judge WILKINSON and Judges RUSSELL, WILKINS, and WILLIAMS joined.

Entered at the direction of Judge MOTZ for the Court.

LUTTIG, Circuit Judge, dissenting:

Out of respect for the rule of law and principles of *stare*

decisis, and in order to avoid confusion concerning the law in our circuit, we have adopted for our court a rule that one panel cannot overrule or modify a published opinion of another panel, *see e.g., Norfolk & Western Ry. v. Director, OWCP*, 5 F.3d 777, 779 (4th Cir. 1993); a modification of precedent may only be made by the full court sitting *en banc*. The necessary corollary of this rule is that in those instances in which a later opinion impermissibly attempts to modify an earlier opinion, the earlier opinion remains the controlling law in the circuit with respect to matters as to which the two opinions unquestionably conflict. Were it otherwise, willing panels, unconstrained by any sense of obligation to the principles of *stare decisis*, our own internal rules, or notions of collegiality, could run roughshod over prior precedent, effectively repealing a rule whose importance to both the rule of law and to the orderly operation of a court is beyond dispute.

Most frequently, in instances where it is believed by certain members of the court (or for that matter, members of the bar) that an opinion effectively overrules or modifies a prior opinion, it may at least reasonably be argued that it does not do so, either because the facts are sufficiently different from those of the earlier case as to render the earlier case inapposite or because the issue presented in the later case, although perhaps closely related, is actually different from that in the earlier case and does not require application of the same principle of law. In such instances, of course, it simply falls to the members of the bar, and ultimately to the court, to reconcile the two authorities in a principled way.

Because of the respect that we accord each other, it is the rare occasion when, even upon careful examination, not only is it apparent that a panel opinion is demonstrably at odds with

prior caselaw, but it cannot reasonably be contended otherwise. In my judgment, *Harter v. Vernon*, No. 96-1434, is, because of its flagrant disregard of our recent opinion in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995), such an opinion. Consequently, under our own rules, it seems to me that it (as opposed to *Gray*) cannot hereafter be regarded as controlling authority on questions of Eleventh Amendment immunity with regard to matters where the two opinions conflict.

The ways in which the panel opinion attempts to alter *Gray* are numerous and undeniable. Indeed, if the panel opinion is placed alongside *Gray*, it is obvious that, despite its disclaimers, the panel opinion was authored as if *Gray* had never even been written.

The panel opinion begins its analysis by boldly stating the "[t]he test [that is] employed in the Fourth Circuit for determining whether an agency or employee constitutes an arm of the state was first stated in *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm.*, 822 F.2d 456 (4th Cir. 1987)." Op. at 337. *Ram Ditta*, however, is no longer the test employed in this Circuit. Rather, the test in this Circuit is that laid out in *Gray*, which expressly refined *Ram Ditta* in light of the Supreme Court's recent decision in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994).

We could not have been clearer in *Gray* that a modification of *Ram Ditta* was required by *Hess*:

> *Hess necessitates a modification of our analysis [in Ram Ditta]* for single state entities only to the extent that it must be read

> to introduce as one of the primary considerations the concern for state sovereignty and to formulate differently several of the other relevant considerations that we had previously enumerated.

51 F.3d at 434. In the very next sentence in *Gray*, we went on to say, referring to the previous three pages of analysis of *Hess* and our own precedent, that,

> [a]lthough the changes in our circuit's Eleventh Amendment analysis wrought by *Hess* arguably are not significant as they bear on the single state issue before us, *neither are they inconsequential.*

Id. (emphasis added). That we modified *Ram Ditta* cannot reasonably be contested.

Indeed, any suggestion (such as that in today's opinion) that *Ram Ditta* applied exactly the standard employed in *Hess* should have been refuted by the fact that the Supreme Court itself vacated and remanded for consideration in light of *Hess* our own opinion in *Ristow v. South Carolina Ports Auth.*, 27 F.3d 84 (4th Cir. 1994), which had relied exclusively on *Ram Ditta. See Ristow v. South Carolina Ports Auth.*, __ U.S. __, 115 S. Ct. 567, 130 L. Ed. 2d 485 (1994).

The modifications that *Gray* held were necessitated by *Hess* were set forth in great specificity in *Gray*. The first and principal change, of course, was that *Hess* elevated to primacy, together with the concern for the state treasury, the concern for state sovereignty, stating that these two concerns are "the Eleventh

Amendment's twin reasons for being." 513 U.S. at __, 115 S. Ct. at 404. As we explicitly said in *Gray*,

> These two concerns, "the Eleventh Amendment's twin reasons for being," *id.* at __, 115 S. Ct. at 404, the Court instructed, should dominate the inquiry in cases where it is difficult to discern whether a particular entity is an arm of the state.

Gray, 51 F.3d at 432. Today's opinion not only does not accord any particular significance to the state sovereignty factor, it effectively reads that factor out of the Eleventh Amendment analysis altogether by holding that it is not an independent factor, but merely a proxy for the other factors collectively.

In fact, in what is a most telling misstatement of *Hess*, today's opinion reads as follows: •

> The [Supreme] Court found that these factors, which echo the factors articulated in *Ram Ditta*, pointed in opposite directions for purposes of determining the Eleventh Amendment immunity of the Port Authority. The *Hess* Court reasoned that when this is the case, a court must focus on "the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury. . . . Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations."

Op. at 337-38. Significantly, what the Supreme Court actually said was *not* that when the factors point in opposite directions courts should focus on the treasury question; what it said was

> [w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide. *See supra* at 400.

513 U.S. at __, 115 S. Ct. at 404. Of course, as noted, the Supreme Court had identified the "twin reasons for being" as concern for the fisc *and*, "[m]ore pervasively," concern for state sovereignty. *Id.* at __, 115 S. Ct. at 400.

Second, although we stated in *Gray* that the concern for the fisc was the most important factor, we did not hold that the impact on the state treasury was necessarily dispositive of the inquiry. Although one could conclude that the treasury concern was dispositive if payment from the treasury was required, *Hess* did not say as much. Thus, we said in *Gray* in language that differs from that in today's opinion, in a slight, but very important way, that,

> it appears that a determination that the state treasury will be liable for a particular judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity. . . . This was ***essentially*** our holding in ***Bockes***.

51 F.3d at 433-34 (citations omitted; emphasis added). There is nothing whatsoever in *Hess* to support the assertion in today's opinion that *Hess* "held" that "the state treasury factor [is] 'dispositive.' " *See* Op. at 339.

Third, we specifically held in *Gray* that where the state treasury will not be affected by the judgment, whether or not immunity will obtain

> must be determined by resort to the other relevant considerations referenced by the Court, *chief among which are whether the suit will jeopardize "the integrity retained by [the] State in our federal system," and whether the state possesses such control over the entity claiming Eleventh Amendment immunity that it can legitimately be considered an "arm of the state."*

Gray, 51 F.3d at 434 (quoting *Hess*, 513 U.S. at __, 115 S. Ct. at 400) (emphasis added). Today's opinion, in stark contrast, reads as follows:

> The state treasury factor is also significant when the state treasury will not pay the judgment. If that is the case, then "the most salient factor in Eleventh Amendment decisions" weighs against a finding of immunity. *Hess*, 513 U.S. at __, 115 S. Ct. at 404. Although in that situation, a court should consider the other *Ram Ditta* factors, *Hess* makes clear that the impact on the state treasury is generally determinative when the state will not have to pay for a judgment: . . .

Op. at 338-39. In short, the proposed opinion simply ignores altogether the nuanced analysis required in *Gray*. Although one can conclude that the treasury concern may be dispositive if

payment from the treasury is required, *see Bockes v. Fields*, 999 F.2d 788, neither *Hess* nor *Gray* implied that Eleventh Amendment concerns are to be discounted and downgraded when the state treasury is not implicated. Yet this is exactly what today's opinion purports to do.

And the list of inconsistencies between today's opinion and *Gray* goes on.

To say, as the court today does, that we did not "articulat[e] the particulars of the Eleventh Amendment inquiry in *Gray*," *see* Op. at 338, is, as should be apparent even from the selected quotations above, simply disingenuous. The majority's view that the *Gray* court must not have detailed the particulars of the analysis because it remanded to the district court is a *non sequitur. Gray* obviously did not remand for the district court to develop the Eleventh Amendment analysis; it remanded for that court to apply our analysis in the first instance so as to determine whether the particular officials in that case were entitled to immunity.

I believe the full court is remiss for not addressing the serious breach of our own rules represented by the panel's opinion. Absent clarification from us, not only do we telegraph how little respect we have for our own precedent and the centrality of *stare decisis* in our jurisprudence, but we also hopelessly confuse the district courts of this circuit by requiring them to apply *Gray (which they are emphatically obliged to do, notwithstanding today's opinion)* even in the face of arguments grounded in *Harter's* unmistakable attempt to "rewrite" *Gray*.

Because of the panel's disregard of our court's precedent in *Gray*, and the consequent affront to the rule of law in our

circuit, I would summarily vacate the panel's decision. At the very least, however, I would rehear the case *en banc* so that the modifications made to *Gray* by today's opinion (which collectively result in a more restrictive interpretation of the Eleventh Amendment than even that in *Hess*) would, at a minimum, enjoy the imprimatur of legitimacy, and so that the district courts within our circuit would not be subjected to the utterly confusing directions from our court that results from today's decision. Left to stand, the bar of our court, as well as the district courts of our circuit, cannot be faulted for wondering whether the operative "rule" of the court is that a panel is bound by earlier precedent unless, through an exercise of raw judicial power, the panel decides that it will not be so bound. When, even as colleagues, we accord our own precedent so little respect, we should hardly be surprised when others do likewise.

WILKINSON, C.J., and DONALD RUSSELL, WILKINS, and WILLIAMS, J.J., join in this opinion.

APPENDIX B — ORDER AND JUDGMENT AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ROCKINGHAM DIVISION FILED MARCH 22, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA ROCKINGHAM DIVISION

CIVIL NO. 3:95CV75

WAYNE HARTER and ROBERT PAYNE,

Plaintiffs,

v.

C.D. VERNON, individually and in his official capacity as Sheriff of Rockingham County; and ROCKINGHAM COUNTY,

Defendants.

ORDER and JUDGMENT

BULLOCK, Chief Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendants' motion for summary judgment is **GRANTED** as to Defendant Rockingham County, and all claims against Defendant Rockingham County are **DISMISSED.**

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IT IS FURTHER ORDERED AND ADJUDGED that Defendants' motion for summary judgment is **GRANTED** as to Plaintiffs' due process claim, and plaintiff due process claim is **DISMISSED** as to all Defendants.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is **DENIED** as to Plaintiffs' First Amendment and North Carolina Constitution claims, **EXCEPT** that Defendant C. D. Vernon's motion for summary judgment based on qualified immunity on Plaintiffs' First Amendment claim in **GRANTED** as to C. D. Vernon in his individual capacity.

FURTHER, the court **DEFERS** ruling on Defendants' motion for summary judgment as to Plaintiffs' wrongful discharge claim.

s/ Bullock, J.
United States District Judge

March 22, 1996

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA ROCKINGHAM DIVISION

CIVIL NO. 3:95CV75

WAYNE HARTER and ROBERT PAYNE,

Plaintiffs,

v.

C.D. VERNON, individually and in his official capacity as Sheriff of Rockingham County; and ROCKINGHAM COUNTY,

Defendants.

MEMORANDUM OPINION

BULLOCK, Chief Judge

Two former employees of the Rockingham County Sheriff's Department ("Department") brought this suit alleging that they were discharged in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution, the North Carolina Constitution, and the public policy of the state of North Carolina. Defendants have moved for summary judgment on all counts, and the court will partially grant that motion.

BACKGROUND

The court takes the evidence in the light most favorable to

Plaintiffs, as it must at this stage. Defendant Sheriff C.D. Vernon hired plaintiff Robert Payne as a deputy in December 1989 and plaintiff Wayne Harter as a dispatcher in January 1991. In 1994, Vernon stood for re-election against three candidates in the Democratic primary. By Vernon's admission, this was his toughest campaign yet.

According to Plaintiffs, Vernon put the resources of his office to work to get re-elected. Vernon ran the campaign out of his sheriff's office. There is some evidence that employees worked on the campaign while on duty and with Department property. Plaintiffs relate a few occasions when, while on the job, they and other Department employees were asked to support Vernon. The Departments second-in-command told officers at shift meetings how to donate money and where to obtain posters. According to Payne, officers were told "Remember who you're working for. The man gave you a job." Other officers also testify that Vernon's high-level assistants made campaign announcements during working hours.

Vernon did not personally confront Plaintiffs; however, coworkers Kathy and Bobby Knight report that Vernon told them that they had to throw themselves completely into the campaign by putting up posters and attending his campaign functions. Vernon also made statements that Bobby Knight interpreted as threats that the Knights would be fired seven weeks after the primary for failing to support him.

Plaintiffs gave Vernon's campaign meager support. Payne donated ten dollars to Vernon's campaign, but he did not vote for any candidate. Harter told Vernon that he supported him but preferred not to campaign for him. Neither participated further in the election, either for or against Vernon.

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Around the time of the primary, Vernon began to investigate alleged wrongdoing by certain deputies. Members of the shift on which Payne worked were taking their breaks in the Sanitary Cafe restaurant without checking out by radio. Vernon's investigation revealed that five deputies had engaged in such behavior. Vernon talked with three of those deputies about these activities. He did not talk to two — Payne and Richard Lintecum — who did not actively support him. Those were the only two he fired.

Vernon says this investigation also revealed that Harter had engaged in unprofessional conduct over the telephone. Harter had joked with callers whom he knew and had derided day-shift workers. Vernon did not confront Harter about this conduct.

On July 15, 1994, Vernon fired seven of his employees, including Plaintiffs. There is evidence that each of the seven either supported Vernon's major opponent, was rumored to have done so, or had not actively supported Vernon.

DISCUSSION

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it could affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Appendix B

I. *Eleventh Amendment Immunity*

Vernon requests that the court accord him immunity from suit in his official capacity under the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides a state with immunity from suits brought in federal court by her own citizens as well as by citizens of another state. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Also, state officers acting in their official capacity are entitled to Eleventh Amendment protection. *Gray v. Laws*, 51 F.3d 426, 430 (4th Cir. 1995). The Eleventh Amendment does not shield local government entities and officers from suit. *Id.* at 431.

Eleventh Amendment protection thus turns on whether Vernon, as sheriff of Rockingham County, was a state or local actor. Until recently, the Fourth Circuit employed a four-part test for Eleventh Amendment protection. *Gray*, 51 F.3d at 431 n.2. Courts had to examine: (1) whether the state treasury was responsible for paying any judgment that might be awarded; (2) whether the official exercised a significant degree of autonomy from the state; (3) whether the official was involved with local versus statewide concerns; and (4) how the official was treated as a matter of state law. *Id. See Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987). Although courts were to balance all four factors, *see id.* at 460, the first factor carried great weight, *see id.* at 457. If the damages would be paid out of the state treasury, the official was always immune. *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). The other three factors were relevant only when the state treasury would be unharmed by any judgment. *Id.* at 790-91.

The test became unsettled after *Hess v. Port Authority Trans-*

Hudson Corp., 115 S. Ct. 394 (1994). In *Hess*, the Supreme Court stressed that the Eleventh Amendment exists to maintain the state's solvency and dignity. *Id.* at 406. The Court thus emphasized that these two interests, rather than any other indicators, are the "prime guide" to the Eleventh Amendment inquiry. *See id.* at 404.[1] In particular, the Court focused on the source of funds that would satisfy a judgment: "If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" — both legally and practically — then the Eleventh Amendment's core concern is not implicated." *Id.* at 406.

While *Hess* established that some factors are more important than others, it did not mandate specifically how lower courts were to weigh those factors. It did not indicate whether the "solvency and dignity" questions are dispositive, or, if not, how that inquiry interacts with the lesser factors. *See Gray*, 51 F.3d at 433 (discussing questions left after *Hess*). Therefore, in *Gray v. Laws*, the Fourth Circuit had to consider whether its prior approach had to be changed after *Hess*. The court read *Hess* to leave mostly intact the circuit's traditional Eleventh Amendment analysis: "In the end, we do not believe that *Hess*, as it applies to single state entities, materially altered [our prior] Eleventh Amendment analysis. . . ." *Gray*, 51 F.3d at 434. While the circuit noted that *Hess* might require it to tinker with its balance of factors, *id.*, it did not direct how to adjust them. *See also Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1053 n.4 (4th Cir.) (not "attempt[ing] to interpret the Court's language concerning state sovereignty and dignity"), *cert. denied*, 116 S. Ct. 514 (1995). This court will not compose a new test. Instead, the

1. The Court rejected the dissent's position that the extent of state control should be dispositive of the immunity determination. *Hess*, 115 S. Ct. at 404.

established four-part test will be applied, keeping in mind the two concerns that underlie the inquiry according to *Hess.*[2]

A. State Treasury Concerns

As discussed above, the most important consideration is the source of funds to pay any judgment. This circuit has said that "it appears that a determination that the state treasury will be liable for a particular judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity." *Gray*, 51 F.3d at 433.

Vernon does not argue that the state will have to satisfy any judgment in this case. Indeed, Vernon's briefs refer the court to *Braswell v. Ellis*, No. 5:94-CV-325-D3 (E.D.N.C. July 19, 1995) (order den. mot. for recons.), which holds that the state treasury does not have to satisfy judgments against sheriffs. Slip op. at 5-6. State statutes indicate several possible sources of payment, none of which is the state treasury.[3] In the face of this authority,

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2. One more preliminary question remains: who bears the burden of proof on Vernon's status as an arm of the state? At least three circuits have recently ruled that the purported state official bears this burden. *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir.), *cert. denied*, 116 S. Ct. 340 (1995); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734 n.5 (7th Cir. 1994); *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993). This is consistent with this circuit's approach in *Beardsley v. Webb*, 30 F.3d 524, 531-32 (4th Cir. 1994). Therefore, Vernon must satisfy this burden.

3. The sheriff must have a bond that covers judgments against him. *See* N.C. Gen. Stat. §§ 58-76-5, 162-8 (1994). Further, if the sheriff's official bond is insufficient, any commissioner of his county who, by reasonable diligence could have discovered the insufficiency, will be liable to the injured party. N.C. Gen. Stat. § 58-72-60 (1994). Finally, if the County's insurance policy covers Vernon, the insurance company may have to satisfy any (Cont'd)

Vernon has not shown that a penny of any judgment could possibly come from the state treasury. The court will consider the other factors in the Eleventh Amendment inquiry, recognizing, however, that this state treasury factor is largely, if not wholly, dispositive.

B. Degree of Autonomy from the State

Vernon also cites *Braswell* for its holding that the state controls the sheriff so much that he is a state actor. The Eastern District concluded in *Braswell* that the sheriff is an arm of the state because the state constitution creates his office, N.C. Const. art. VII, § 2, and North Carolina statutes are full of provisions that govern sheriffs: the term of office, N.C. Gen. Stat. § 162-1 (1994); the qualifications of office, N.C. Gen. Stat. § 162-2 (1994); the duty to handle process, N.C. Gen. Stat. § 162-13 to -14 (1994); the duty to keep the jail, N.C. Gen. Stat. § 162-22 to -23, -32 to -61 (1994); and so forth. *Braswell,* slip op. at 6. Therefore, *Braswell* holds that North Carolina sheriffs must be considered arms of the state to protect the integrity of the sovereign state.

However, that logic is not convincing. First, an entity is not an arm of the state simply because North Carolina regulates it, or even because the state constitution creates it. *See Hess,* 115 S. Ct. at 404. Municipalities are not entitled to Eleventh Amendment protection, *Gray,* 51 F.3d at 431, yet they too are created by the state constitution,[4] and are more extensively

(Cont'd)

shortfall. *Smith v. Phillips,* 117 N.C. App. 378, 381-84, 451 S.E.2d 309, 312-13 (1994).

4. Both municipalities and the office of sheriff are created in the "Local Government" section of the constitution. N.C. Const. art. VII.

regulated than sheriffs, *compare* N.C. Gen. Stat. ch. 160A (1994) *with* N.C. Gen. Stat. ch. 162 (1994).

The proper inquiry is whether the sheriff, in his employment decisions, exercises a significant degree of autonomy from the state. The inquiry must focus narrowly on the actions alleged because the sheriff may be a state officer for some purposes but not others. *See Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2421 (1993). The state statutes allow a sheriff to "appoint a deputy or employ others to assist him in performing his official duties." N.C. Gen. Stat. § 162-24 (1994). However, the state apparently has little control over the sheriff's employment practices. Instead, the sheriff has authority to hire and fire whom he wants, subject to slight limits from the county commissioners.[5] Thus, federal jurisdiction over Vernon would not interfere with the state's sovereignty and dignity because the state has nothing to do with his employment decisions. This factor weighs against Eleventh Amendment immunity.

C. Statewide Versus Local Concerns

The third factor is whether the sheriff is involved with statewide or local concerns. The sheriff is elected by the voters of a single county. N.C. Gen. Stat. § 162-1. Many of his qualifications, powers, and duties are defined in terms of his locality. *See, e.g.*, N.C. Gen. Stat. § 162-2 (sheriff must be

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5. "Each sheriff . . . has the exclusive right to hire, discharge, and supervise the employees in his office." N.C. Gen. Stat. § 153A-103 (1991); *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 450, 368 S.E.2d 892, 894, *disc. review denied & appeal dismissed*, 323 N.C. 366, 373 S.E.2d 547 (1988). The board of commissioners can only fix the number of the sheriff's employees. N.C. Gen. Stat. § 153A-103.

resident of county); N.C. Gen. Stat. § 162-22 (sheriff operates county jail). Vernon does not make any countervailing showing that the sheriff is involved primarily with statewide concerns. This factor weighs against Eleventh Amendment immunity.

D. State Law Characterization of Sheriff

Finally, the court must consider whether North Carolina law classifies a sheriff as a state or local official. This factor is not controlling:

> While "[a] state court's view of the status of a state political entity" may be relevant "in determining whether that entity is entitled to eleventh amendment immunity," "the question of whether an agency is the *alter ego* of the state and thereby immune from federal jurisdiction under the eleventh amendment is a question of federal, not state, law."

Gray, 51 F.3d at 435 (quoting *Ram Ditta*, 822 F.2d at 459, 458 n.5).[6]

North Carolina courts do not consistently characterize sheriffs as either state or local. In *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993), the court of appeals held that

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6. Some of the decisions that Vernon cites rely entirely on state law characterizations of the sheriff. *See Jenkins v. Medford*, No. 1:95CV126-T, slip op. at 10-11 (W.D.N.C. Nov. 27, 1995) (mem. & recommendation of mag.); *Edwards v. Smith*, No. 5:94-CT-24-BR, slip. op. at 2 (E.D.N.C. Sept. 23, 1994) (order).

a sheriff, because he is a state official, is not a "person" in Section 1983 suits for money damages. *Id.* at 713-14, 431 S.E.2d at 493.[7] However, that court has also held that a sheriff, because he is a local official, is not subject to the jurisdiction of the state industrial commission. *Hull v. Oldham,* 104 N.C. App. 29, 41, 407 S.E.2d 611, 618, *disc. review denied,* 330 N.C. 441, 412 S.E.2d 72 (1991). Thus, this factor does not point clearly in either direction.

After weighing all four factors, with due regard given to the two main concerns expressed in *Hess*, the court finds that Vernon has not shown that he is entitled to Eleventh Amendment immunity.

II. *Claims Against Defendant Rockingham County*

The County seeks dismissal of all claims against it. The court will grant summary judgment to the County on Plaintiffs' Section 1983 claims because Vernon was not acting pursuant to a policy of the County. Further, the state law claims will be dismissed against the County because under state law the sheriff is not an agent of the county in employment decisions.

A county may be liable only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. *Monell,* 436 U.S. at 694. This

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7. *Messick* loses much, if not all, of its persuasiveness because the court also appeared to rule that a county was a state agency and thus not a "person" under § 1983. 110 N.C. App. at 713-14, 431 S.E.2d at 493. This is wrong, *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978), so it calls into question the court's understanding of the sheriff's status under § 1983 as well.

policy may be established by the actions of officials who have final policymaking authority with respect to the action. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). The question before the court is whether the sheriff's employment decisions may be attributed to the County as its policy.

The court finds that the County cannot be liable under Section 1983 for Vernon's employment decisions. North Carolina gives the sheriff final policymaking authority on employment decisions. *See* N.C. Gen. Stat. § 153A-103. The county board of commissioners has minimal input into employment matters. It may fix the number of the sheriff 's employees (so long as there are at least two deputies). *Id.* Also, it must approve the hiring of both the sheriff's relatives and certain criminals. *Id.* However, it cannot control or review the sheriff's employment decisions. *See Peele*, 90 N.C. App. at 450, 368 S.E.2d at 894. Thus, a sheriff has final policymaking authority in employment decisions, but he does not exercise that authority on behalf of the county. *Hughes v. Bedsole*, 913 F. Supp. 420, 426-27 (E.D.N.C. 1994), *aff'd on other grounds*, 48 F.3d 1376 (4th Cir.), *cert. denied*, 116 S. Ct. 190 (1995); *Jones v. Cumberland County*, No. 3:94-CV-32-BR2, slip op. at 7 (E.D.N.C. Aug. 21, 1995) (order).

Plaintiffs contend that *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991), compels a different result. *Dotson* indicated that whether the sheriff's actions bind the county depends on the particular function that the sheriff is performing. *Id.* at 926-28. *Dotson* held that when a Maryland sheriff was operating the county jail, he had final policymaking authority for the county. *Id.* at 928. In order to reach that conclusion, the court exhaustively reviewed state and county law and determined that the county was responsible for its jail and had delegated to the sheriff the authority to keep it. *Id.* at 928-32. Here, on the other

hand, the County had little control over Vernon's employment practices.[8]

Plaintiffs also argue that this court's holding is inconsistent with *Spencer v. Byrd*, 899 F. Supp. 1439 (M.D.N.C. 1995). In *Spencer*, Judge Tilley decided that a county was an "employer" of a deputy sheriff under Title VII. *Id.* at 1441. *Spencer* is inapposite because it was construing the meaning of the term "employer" in a particular federal statute, 42 U.S.C. § 2000e. In contrast, here the court must examine state laws to determine the County's role in Vernon's employment decisions. *See Dotson*, 937 F.2d at 924. *Spencer* recognized that state laws would yield a different result: "Although state law is clear on the fact that the County is not the employer of a Sheriff's deputy, the question facing the Court is one of federal law." 899 F. Supp. at 1441. Therefore, Plaintiffs' Section 1983 claims against the County will be dismissed.

In addition, Plaintiffs' state law claims against the County will be dismissed. As the foregoing discussion indicates, the sheriff exercises autonomy in deciding whom to hire and fire. In *Peele v. Provident Mutual Life Insurance Co.*, the state court of appeals dismissed the county from a suit brought under state law for a sheriff's discharge of a dispatcher. 90 N.C. App. at 450, 368 S.E.2d at 894. The court ruled that the dispatcher was an employee of the sheriff and not of the county. *Id.* Therefore, these claims must be dismissed against the County.

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8. In the same way, this case is different from *Flood v. Hardy*, 868 F. Supp. 809 (E.D.N.C. 1994), in which the court held that the county could be liable for the sheriff's decisions in keeping the county jail. *Id.* at 812-13.

Appendix B

III. *Procedural Due Process*

Defendants move for summary judgment on Plaintiffs' claim that Defendants denied them property rights in their positions without due process of law. The court will dismiss this claim because Plaintiffs cannot show that they had constitutionally protected property interests in their continued employment.

To be entitled to the due process clause's safeguards, a plaintiff must have been deprived of liberty or property. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Beckham v. Harris*, 756 F.2d 1032, 1036 (4th Cir.), *cert. denied*, 474 U.S. 903 (1985). "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). The proper first question therefore is not whether the sheriff's department failed to follow certain procedures, but instead whether Plaintiffs were entitled to their jobs. *See Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."); *Garraghty v. Commonwealth of Va., Dep't of Corrections*, 52 F.3d 1274, 1284 (4th Cir. 1995). This is determined by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 344 & n.7 (1976); *Garraghty*, 52 F.3d at 1279.

In North Carolina, employees are presumed to hold their jobs at will unless they have a contract for a specified term or a fixed duration. *Kristufek v. Saxonburg Ceramics Inc.*, 901 F. Supp. 1018, 1023 (W.D.N.C. 1994), *aff'd*, 60 F.3d 823 (4th Cir. 1995); *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987); *Rucker v. First Union Nat'l Bank*, 98 N.C.

App. 100, 102, 389 S.E.2d 622, 624, *disc. review denied*, 326 N.C. 801, 393 S.E.2d 899 (1990). Moreover, the sheriff has the exclusive right to hire, fire, and discipline deputies. N.C. Gen. Stat. § 153A-103. Courts thus have recognized that a sheriff can discharge deputies with or without cause. *See Hughes*, 913 F. Supp. at 429; *Peele*, 90 N.C. App. at 451, 368 S.E.2d at 894-95. Therefore, deputies normally have no property interest in their jobs.

Plaintiffs assert that their property rights in their jobs flow from an employment manual. North Carolina courts are "clear" that " 'unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it.' " *Black v. Western Carolina Univ.*, 109 N.C. App. 209, 213, 426 S.E.2d 733, 736 (quoting *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84, *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986)), *cert. denied*, 334 N.C. 433, 433 S.E.2d 173 (1993); *Rucker*, 98 N.C. App. at 103, 389 S.E.2d at 624-25. In this case, Plaintiffs allege that they were given the handbook shortly after their arrival, and Harter attended a seminar on the handbook. The handbook provides that employees cannot be discharged except for certain causes. Although the handbook does not unambiguously apply to the deputies, Vernon adopted the handbook for the department in May 1984, before either Plaintiff began working for the department. However, Vernon never discussed the handbook with Plaintiffs, and Plaintiffs were never told explicitly that it was part of their employment contracts.

Similar cases have held that such handbooks cannot become part of an employment contract in North Carolina. *See Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 81, 370 S.E.2d 605, 608, *disc. review denied*, 323 N.C. 626, 374 S.E.2d

590 (1988); *Buffaloe v. United Carolina Bank*, 89 N.C. App. 693, 696, 366 S.E.2d 918, 920 (1988); *Walker*, 77 N.C. App. at 259, 335 S.E.2d at 83-84. Therefore, they cannot form the basis of a property right. Further, in almost exactly the same situation, the Fourth Circuit held that an employee handbook did not give a deputy an entitlement to his job because Virginia law made clear that sheriff's deputies serve at the discretion of their sheriff. *Jenkins v. Weatherholtz*, 909 F.2d 105, 108-09 (4th Cir. 1990). Thus, the court concludes that the handbook did not give Plaintiffs protectible property interests in their jobs.[9]

IV. *First Amendment*

Plaintiffs claim that Vernon violated their First Amendment rights by firing them for their lukewarm support of Vernon's 1994 campaign. The court concludes that sufficient issues of fact exist for this claim to survive summary judgment. However, Vernon is entitled to qualified immunity from damages in his individual capacity.

The court's first consideration is which First Amendment test to apply. Plaintiffs maintain that the court should apply the test from the Supreme Court's political patronage cases: *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Elrod v. Burns*, 427 U.S. 347

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9. Plaintiffs also assert that this personnel policy rose to the level of an ordinance that gave them a reasonable claim of entitlement to continued employment. However, there is no evidence that the policy was adopted with the formalities required to form the basis of a property interest. *See Dunn v. Town of Emerald Isle*, 722 F. Supp. 1309, 1311 (E.D.N.C. 1989), *aff'd*, 918 F.2d 955 (4th Cir. 1990). Also, it seems doubtful that the county has the power to adopt an ordinance abrogating the sheriff's statutory power to discharge employees.

(1976). Vernon, on the other hand, claims that the court is governed by the Supreme Court's public employee speech cases: *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Courts have split on their analysis of cases such as this one, and much turns on the resolution of this question. *See generally* Jonathan Epstein, Comment, *You Have No Right to Remain Silent: The Strange Case of Elected Officials and Coerced Campaigning*, 1995 U. Chi. Legal F. 339.

In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the Fourth Circuit apparently adopted the *Pickering* line to govern cases of employee political neutrality. The court ruled that the patronage line applied narrowly to "discharges concededly based only upon the employees' party affiliations." *Id.* at 1334 n.6. The court continued:

> We recognize that the principle might be thought to run as well to coerced political loyalty to individual employers (even of the same political party). The effect of such an extension of *Elrod-Branti* patronage discharge principles would be, however, necessarily to carry over to other discharges than those solely for party affiliation, the extremely narrow justification basis defined in *Branti*. We do not believe that test is suited to the "personal political loyalty" situation; it is too narrow.

Id. at 1334-35 n.6 (citations omitted). The court thus consigned *Elrod*, *Branti*, and *Rutan* to cases of "raw political patronage (party affiliation alone)" and placed the bulk of cases dealing

with "arguably protected 'expressive conduct' " under the *Pickering* line of cases. *Id.* at 1335. In this case, there was no "raw" patronage decision because Plaintiffs and Vernon belonged to the same party. Also, Plaintiffs allege that they engaged in overt speech. Therefore, the court will apply the *Pickering* test.

The court must first ask what "speech" Plaintiffs have allegedly made in this case. Payne gave Vernon a ten dollar campaign contribution. This is speech. *See Buckley v. Valeo,* 424 U.S. 1, 16 (1976). Harter told Vernon that he supported him but would not campaign for him. This, too, is speech.

However, silence also can be speech that is eligible for First Amendment protection. *Wooley v. Maynard,* 430 U.S. 705, 717 (1977); *Board of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). At this stage, Plaintiffs have sufficiently shown that their decisions not to put up campaign posters, not to attend campaign rallies, not to work the polls, and not to donate heavily to the campaign, are speech eligible for First Amendment protection.

The next step is the crucial one in this case. The court may protect this speech only if it may be "fairly characterized as constituting speech on a matter of public concern." *Connick,* 461 U.S. at 146. Vernon maintains that Plaintiffs did not speak on a matter of public concern because they did not widely communicate their neutrality to the public. The court rejects that position. It is true that whether speech is a matter of public concern "must be determined by the content, form, and context" of that speech. *Id.* at 147-48. The "content, form, and context" inquiry is intended to help the court make the key distinction between speech "as a citizen upon matter of public concern" versus speech "as an employee upon matters only of personal interest." *See id.* at 147. In this determination, the "context" of

the speech is not dispositive; just because a matter is not broadcast to the world does not make it of only private concern. *See Rankin*, 483 U.S. at 386 n.11 (statement to coworker/ boyfriend in private is on matter of public concern); *Jones*, 727 F.2d at 1334 (statement on matter of public concern can be made in private conversation). The test instead focuses on content. *Arvinger v. Mayor & City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988).

Speech on matters of government and elections in at the heart of the First Amendment's protection. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). Here, Payne's donation and Harter's stated refusal to work for Vernon's campaign are instances of speech on a matter of public concern. Further, Plaintiffs were also speaking on a matter of public concern by their silent refusal to promote or finance his campaign. *See Langford v. Lane*, 921 F.2d 677, 680-81 (6th Cir. 1991) (holding that employee could be speaking on a matter of public concern by refusing to talk with a supervisor about a problem); *Sykes v. McDowell*, 786 F.2d 1098, 1104 (11th Cir. 1986) (ruling that deputy engaged in protected speech by refusing to support the sheriff); *Brown v. Reardon*, 770 F.2d 896, 903 (10th Cir. 1985) (suggesting that plaintiffs could prove that deciding not to buy tickets to a fund-raiser could be protected speech); *Lindahl v. Bartolomei*, 618 F. Supp. 981, 990 n.7 (N.D. Ind. 1985) (holding that there is a right to remain neutral in politics and other speech). *But see Aspinwall v. Herrin*, 879 F. Supp. 1227, 1238 (S.D. Ga. 1994) (holding that silent political neutrality is not speech on a matter of public concern).

Vernon has cited *Olivo v. Mapp*, 57 F.3d 1067 (table), 1995 WL 339049 (4th Cir.) (per curium), *cert. denied*, 116 S. Ct. 673 (1995), for the proposition that a deputy's neutrality in his

sheriff's campaign is not speech on a matter of public concern. In that case, the panel held that a deputy was communicating merely a private concern when he did not buy a ticket to a fundraiser and expressed disapproval of it, did not contribute to the campaign, and expressed his neutrality in the election. *Id.* at *3. The panel found that the speech was "more aptly characterized as an expression of frustration over being asked to pay forty dollars for a crab feast." *Id.* Vernon contends that this situation is analogous.

The court hesitates to counter one unpublished per curiam opinion with another, but *Orga v. Williams*, 68 F.3d 460 (table), 1995 WL 592241 (4th Cir. Oct. 6, 1995) (per curiam), demonstrates that a deputy's neutrality in a sheriff's election can be speech on a matter of public concern. In *Orga*, the court concluded that the deputies engaged in speech on a matter of public concern when they refused to support the sheriff actively. *Id.* at *4.[10] By comparing these cases, it becomes apparent that the court must engage in a fact-specific determination when it decides whether neutrality is speech on a matter of public concern or not. In this case, unlike *Olivo,* there is insufficient evidence at this stage to lead the court to conclude that Plaintiffs were merely expressing personal concerns when they communicated their neutrality, both overtly and silently.

Once the speech is characterized as a matter of public concern, Vernon can still escape liability in either of two ways. First, Vernon can show that the speech did not cause the

10. The court wrote: "[The plaintiffs] alleged that they were terminated because they had not supported [the sheriff's] candidacy and because they had been suspected of supporting his rivals. We agree with the district court that their political speech in the context of an election for sheriff involved a matter of public concern." *Orga,* 1995 WL 592241, at *4.

terminations. If Plaintiffs meet their burden of showing that the speech was a motivating factor in the decision, the burden shifts to Vernon to prove that he would have fired Plaintiffs even without the speech. *Hall v. Marion Sch. Dist. No.* 2, 31 F.3d 183, 194 (4th Cir. 1994). This is a factual issue. *Id.*

Plaintiffs' case is based on circumstantial evidence; however, a jury could reasonably conclude that Vernon fired them because of their speech. Seven employees were all fired on one day after a campaign in which there was on-the-job pressure to support Vernon. Of the other five (aside from Plaintiffs), two quietly supported Vernon's main opponent, and three were rumored to support the opponent. Vernon allegedly threatened to fire two of those employees if they did not campaign for him.

A genuine issue of material fact also exists on whether Vernon's purported reasons for firing Plaintiffs were pretextual. Vernon claims that he fired Payne for going to the Sanitary Cafe on breaks without checking out on the radio. However, five deputies did the same thing and only two were fired. Vernon claims that he fired Harter because he was unprofessional over the radio; however, Harter's comments were not so objectionable as to make it unreasonable for a jury to find that Vernon did not fire Harter for that reason.

In sum, there are genuine issues of material fact as to Vernon's motivation for firing Plaintiffs. Therefore, Vernon has not justified summary judgment on this ground.

Vernon has a second chance to escape liability. A public employee's speech is unprotected if the employee's interest in the speech is outweighed by the public employer's "interest in effective and efficient fulfillment of its responsibilities to the

public." *Connick*, 461 U.S. at 150. The employer may show that his interests may be hampered when an employee's speech might disrupt the office, undermine authority, or destroy close working relationships. *See id.* at 154. Balancing the interests is a question of law on which Vernon bears the burden of persuasion. *Jones*, 727 F.2d at 1334. Vernon has not yet met his burden.

Vernon argues in his brief that the discipline and loyalty demanded of law enforcement officers require that he have people that he can trust below him. However, the need for efficiency in a law enforcement setting does not *per se* override employees' interest in speaking on matters of public concern. *See Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 398 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Jan. 10, 1996) (No. 95-1119); *Bieluch v. Sullivan*, 999 F.2d 666, 671-72 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 926 (1994). Vernon brings forth insufficient evidence that, in this case, he reasonably could have apprehended that Plaintiffs' speech would hamper his operations. At this stage, Vernon thus has not persuaded the court that he is entitled to have the *Pickering* balancing test come out in his favor.

In sum, the court finds that Plaintiffs have shown that their speech was on a matter of public concern. Plaintiffs also have created a genuine issue of material fact on whether this speech was a motivating factor in their firing. Vernon has not countered with a sufficient showing at this point that either (1) he would have fired Plaintiffs even without their speech, or (2) his interest in efficiency outweighed Plaintiffs' interest in speech. Therefore, summary judgment as to the substantive claim is inappropriate.[11]

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11. The standards under the First Amendment are the same as those for Article I, Section 14 of the North Carolina Constitution. *See Lenzer v. Flaherty*, 106 N.C. App. 496, 515, 418 S.E.2d 276, 287-88, *disc. review*
(Cont'd)

The court, however, will grant qualified immunity to Vernon in his individual capacity. Government actors are entitled to qualified immunity from civil damages for doing their jobs "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For a right to be "clearly established," [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). *See Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir.) (holding that the rights must be clearly established in a particularized sense), *cert. denied*, 116 S. Ct. 530 (1995). Qualified immunity must be allowed unless "in the light of pre-existing law the unlawfulness [was] apparent." *DiMeglio v. Haines*, 45 F.3d 790, 803 (4th Cir. 1995). *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (noting that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."); *Maciarello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) ("[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines."), *cert. denied*, 506 U.S. 1080 (1993). "This tolerance for a range of reasonable public actions is particularly important for those who must interpret often imprecise or incomplete legal precedent." *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992).

There is sometimes a thin line separating speech on public concerns, speech on private concerns, and conduct that is not speech at all. This is true because whether something is speech

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(Cont'd)

denied, 332 N.C. 345, 421 S.E.2d 348 (1992). The court thus will deny Vernon's motion for summary judgment on Plaintiffs' state constitutional claim.

on a matter of public concern is determined by its content, form, and context on the whole record. *See Connick*, 461 U.S. at 147-48. This is often a complex inquiry that is not easily done by employers. *Cf. DiMeglio*, 45 F.3d at 806 (noting that it seldom will be "clearly established" that employee speech is protected); *Lawrenz v. James*, 852 F. Supp. 986, 991 (M.D. Fla. 1994) (describing the many considerations in this inquiry), *aff'd*, 46 F.3d 70 (11th Cir. 1995).

The Fourth Circuit has not clearly illuminated the path of public employers dealing with politically neutral employees. *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir.), *cert. denied*, 484 U.S. 930 (1987), which concerned a deputy who campaigned against the sheriff, established that a sheriff could fire certain employees for their political speech. However, it did not clearly establish that a sheriff could not fire politically neutral employees.[12] The parties have not pointed out a case prior to May 1994 in which a controlling court had ruled on the

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12. The Fourth Circuit's qualified immunity discussion in *Orga* is on-point:

> [W]e conclude that the right asserted by [the deputies] had not been clearly established by Fourth Circuit case law. In *Joyner*, we affirmed the dismissal of the senior captain of a North Carolina sheriff's department because he actively campagned for the sheriff's opponent. Although the plaintiff in *Joyner* had an important, supervisory role, his campaigning caused major disruptions, and he was acting in part for personal gain, we find that it would have been reasonable for [the sheriff] to rely on *Joyner* despite these distinctions. *Joyner* clearly established that a sheriff could terminate certain employees for their

(Cont'd)

constitutionality of discharge of a politically neutral employee. Other courts in 1994 were split on similar factual patterns. *Compare Sykes*, 786 F.2d at 1104 (holding that neutral employee engaged in protected First Amendment activity) *with Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir.) (holding that First Amendment did not protect neutral employee), *cert. denied*, 114 S. Ct. 176 (1993).

Since the Plaintiffs' discharge, the Fourth Circuit has handed down the unpublished, per curiam opinions in *Olivo* and *Orga*. These decisions reached different conclusions about the nature of similar speech by neutral deputies. Two of the circuit's panels apparently saw the slight factual distinction between the cases, but this court does not expect that a public employer acting in good faith could see the difference so readily. The court, therefore, will grant Vernon qualified immunity in his individual capacity on the First Amendment claim because the contours of Plaintiffs' rights were not clearly established.

V. Wrongful Discharge

Plaintiffs' final claim is that Vernon wrongfully discharged them in violation of public policy. Plaintiffs claim that they were protected by the policy in North Carolina General Statutes Section 153A-99 (Supp. 1995). This statute protects a "county employee" from coerced political activity. *Id.* After the parties

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(Cont'd)

> political speech and did not clearly establish that sheriffs could not terminate nonsupervisory employees who did not cause disruptions and who did not act for personal gain.

Orga, 1995 WL 592241, at *6 (citations omitted).

filed their briefs, Section 153A-99 was interpreted for the first time. *Vereen v. Holden*, __ N.C. App. __, __, 1996 WL 95066 (Mar. 5, 1996). The state court of appeals held that the statute can form the basis for a wrongful discharge claim. *Id.* at *3. In light of *Vereen*, the parties should more carefully examine the question of whether such a claim can be made against Vernon in this case. The court, therefore, will withhold its judgment on this claim until trial.[13]

CONCLUSION

The court will grant Defendants' motion for summary judgment in part. All claims against the County will be dismissed. Plaintiffs' due process claim will be dismissed. While the court will deny the motion for summary judgment on Plaintiffs' First Amendment claim, Vernon will receive qualified immunity in his individual capacity on that claim. Finally, the court will withhold judgment on the state wrongful discharge claim.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

s/ Bullock, J.
United States District Judge

March 22, 1996

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13. Defendants also assert that Vernon is entitled to state sovereign immunity on this claim. The court will not dismiss the claim now on this basis. Sheriffs have sovereign immunity from recovery on their bond unless plaintiffs join the surety. *Messick*, 110 N.C. App. at 715, 431 S.E.2d at 494. However, plaintiffs can move to join the surety. *Id.* Further, immunity is waived to the extent that a county's insurance covers the sheriff. *Smith*, 117 N.C. App. at 383, 451 S.E.2d at 314. The parties have not fully addressed the issue of insurance coverage.

APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JANUARY 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 17, 1997

No. 96-1434
CA-95-75-3

WAYNE HARTER; ROBERT PAYNE

Plaintiffs-Appellees

v.

C.D. VERNON, individually and in his official capacity as Sheriff of Rockingham County; ROCKINGHAM COUNTY

Defendants-Appellants

GUILFORD COUNTY

Movant

On Petition for Rehearing with Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc.

Appendix C

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Wilkinson, Russell, Widener, Wilkins, Luttig and Williams voted to rehear the case in banc, and Judges Hall, Murnagham, Ervin, Niemeyer, Hamilton, Michael, and Motz voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Motz for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK